

No. 14527

United States
Court of Appeals
for the Ninth Circuit

WIEL AND AMUNDSEN, A/S, as Claimant of
the S.S. ROMULUS,

Appellant,

vs.

ROY E. POTTER,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon.

FILED

FEB 15 1955

PAUL P. O'BRIEN,

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and **cancelled herein** accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States
for the District of Oregon

Civil No. 7202

ROY E. POTTER,

Libelant,

vs.

The "S.S. Romulus," Her Engines, Tackle and Gear, and Any and All Persons Claiming Any Interest Therein, and WIEL and AMUNDSEN A/S of Halden, Norway, and J. B. STAND of Oslo, Norway, and A/S LUDWIG MAIVENCKELS REDERI of Bergen, Norway, Owners and/or Charterers, and LATIN-AMERICAN LINES, Operators and/or Charterers,

Respondents.

**LIBEL IN REM AND IN PERSONAM WITH
FOREIGN ATTACHMENT**

To the Honorable Judges of the United States District Court for the District of Oregon, in Admiralty Sitting:

The libel and complaint of Roy E. Potter, long-shoreman, in a cause of personal injury and tort, civil and maritime, against the SS Romulus, her engines, tackle and gear, and any and all persons claiming any interest therein, and Wiel and Amundsen A/S of Halden, Norway, and J. B. Stang of Oslo, Norway, and A/S Ludwig Maivenckels Rederi of Bergen, Norway, owners and/or charterers, and

Latin-American Lines, operators and/or charterers, respectfully shows on information and belief:

Article I.

That during all the times herein mentioned, the SS Romulus was and now is, and during the currency of process herein will be within the State of Oregon, and upon navigable waters of the United States of America, and within the jurisdiction of this Honorable Court; that at all times herein mentioned the owner of said vessel was and now is Amundsen A/S of Halden, Norway, and J. B. Stang of Oslo, Norway, and A/S Ludwig Maivenckels Rederi of Bergen, Norway, a corporation, company or concern of Norway, composed of citizens of Norway, and said vessel was chartered and/or operated by Latin-American Lines, a corporation, company or concern.

Article II.

That at all times herein mentioned, libelant was a longshoreman and on or about September 26, 1953, was engaged in assisting to load said vessel with cargo at City Dock, Coos Bay, Oregon, and libelant and other longshoremen were in the employ of a master stevedore, to wit, Independent Stevedoring Co., when libelant, during the course of his employment, met with the injuries and accident hereinafter set forth.

Article III.

That while libelant was performing his duties as a hatch boss at No. 1 Hatch, he was suddenly caused,

solely by the unseaworthiness of said vessel and negligence of said ship owner, its charters, agents, officers, employees and representatives, to fall with great force and violence upon the deck of said vessel, causing him severe bruises and contusions to his head and body, severe nervous shock, mental and physical pain and suffering, a severe tearing, twisting and wrenching of the bones, muscles, tendons, ligaments and soft tissue of his body, from all of which libelant suffered great pain, was rendered sick, sore, nervous and distressed and has been permanently injured, and all to his damage in the full sum of \$30,000.00.

Article IV.

That libelant has incurred doctor, hospital and medical expenses and will incur further of the same; that libelant has lost wages from said accident and will lose further wages.

Article V.

That at the time of the happening of said accident, libelant was a healthy, robust, able-bodied man, capable of engaging in heavy manual labor, of the age of 36 years, with a life expectancy under the Standard Mortality Tables of 33.48 years; that this libelant's ability to work and perform manual labor has been seriously and permanently impaired.

Article VI.

That libelant elects to pursue a remedy against a third person, pursuant to the provisions of the Long-

shoremen's and Harborworkers' Act of the United States, and has filed with the United States Department of Labor, Bureau of Employees' Compensation, a notice of election to sue.

Article VII.

That said owners of said vessel are non-residents of the United States and of the State of Oregon and said owners cannot be found within the jurisdiction of this Honorable court; that said owners have effects within the jurisdiction of this court, to wit: The S.S. Romulus, a steamship. That said vessel is presently moored at Coos Bay, Oregon; that said vessel is in the possession of and as bailee of a person by the name of John Doe, the Master of said vessel, who it is believed holds said effect as a garnishee.

Article VIII.

That libelant's residence, domicile and address is 858 South 11th Avenue, Coos Bay, Oregon.

Article IX.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this honorable court.

Wherefore, libelant prays that process according to the course of this honorable court in a cause of admiralty and maritime jurisdiction may issue against the respondent vessel, S.S. Romulus, her tackle and gear, and that all persons claiming any interest in said vessel may be cited to appear and

answer all and singular the matters aforesaid; that this honorable court may be pleased to decree the payment of \$30,000.00 to libelant; that the respondent vessel, S.S. Romulus, may be condemned and sold to pay the same; that citation in due form of law may issue against the respondent herein, Wiel and Amundsen A/S of Halden, Norway, and J. B. Stang of Oslo, Norway, and A/S Ludwig Maivenckels Rederi of Bergen, Norway, and Latin-American Lines, citing it to appear and answer in the premises; that in case said respondent owner cannot be found within this district, then that all goods and chattels belonging to the said respondent within the district, and in particular the said vessel known as the S.S. Romulus, presently within this district, with its spare parts and accessories, all in the possession of the said John Doe, the Master of said vessel, may be attached by process of foreign attachment in the amount of \$30,000.00, the sum sued for in this libel, with interests and costs and disbursements of the libelant; and that said garnishee, John Doe, be cited and admonished to appear and answer on oath as to the said effects of the respondent in his hands.

/s/ NELS PETERSON,

/s/ FRANK H. POZZI,

Proctors for Libelant.

Duly verified.

[Endorsed]: Filed September 26, 1953.

[Title of District Court and Cause.]

CLAIM OF VESSEL

Comes now Wiel and Amundsen, A/S, owners of the S.S. Romulus, and claims said vessel and prays leave to defend this suit accordingly.

Dated: October 8, 1953.

WIEL & AMUNDSEN, A/S,

By J. J. MOORE AND COMPANY,
INC.,

Agents;

By /s/ ERSKINE WOOD.

Subscribed and sworn to before me this 8th day of October, 1953.

[Seal] /s/ W. A. LEAF,

Notary Public for Oregon.

My Commission Expires May 13, 1956.

WOOD, MATTHIESSEN,
WOOD & TATUM,

/s/ JOHN R. BROOKE,
Proctors for Claimant.

Service of copy acknowledged.

[Endorsed]: Filed October 12, 1953.

[Title of District Court and Cause.]

STIPULATION TO ABIDE THE
DECREE AND FOR COSTS

Whereas a libel was filed in this Court and cause on the 26th day of September, 1953, by Roy E. Potter, libelant, against the S.S. Romulus, her engines, tackle and gear, for the reason and causes in said libel mentioned; and

A claim to said vessel has been filed by Wiel and Amundsen, A/S, as claimant, and the said claimant and National Surety Corporation, duly authorized to do business in this jurisdiction and to execute this stipulation, hereby consenting and agreeing that in case of default and contumacy on the part of the claimant, execution may issue against their goods, chattels and lands in the Sum of Thirty Thousand Dollars (\$30,000.00);

Now, Therefore, It Is Hereby Stipulated and Agreed for the benefit of whom it may concern that the stipulators undersigned are jointly and severally bound in the sum of \$30,000.00, conditioned that the claimant above named shall abide by and pay the money, including costs and disbursements, awarded by the final decree rendered in this cause by this Court or in the case of appeal by the Appellate Court.

Dated: October 8, 1953.

WIEL AND AMUNDSEN, A/S,
By J. J. MOORE AND COMPANY,
INC.,
Agents.

By /s/ ERSKINE WOOD.

NATIONAL SURETY
CORPORATION,

By /s/ W. R. GILHAM,
Attorney-in-Fact.

Countersigned:

PHIL GROSSMAYER CO.,
Gen'l Agents;

By /s/ W. R. GILHAM,
Resident Agent.

The foregoing stipulation is hereby approved as
to form and amount this 12th day of October, 1953.

/s/ FRANK H. POZZI,
Of Proctors for Libellant.

[Endorsed]: Filed October 12, 1953.

[Title of District Court and Cause.]

NOTICE OF GENERAL APPEARANCE

Comes now Wiel and Amundsen, A/S, and hereby enters its appearance in the above-entitled suit.

Dated: October 8, 1953.

WOOD, MATTHIESSEN,
WOOD & TATUM,

/s/ JOHN R. BROOKE,

Proctors for Wiel and Amund-
sen, A/S, Respondents.

Service of copy acknowledged.

[Endorsed]: Filed October 12, 1953.

[Title of District Court and Cause.]

ANSWER

Comes now respondent and claimant and for its answer to the libel herein, admits, denies and alleges:

I.

Admits at all times mentioned herein the S.S. Romulus was upon navigable waters of the United States within the State of Oregon and jurisdiction of this Honorable Court, and that the owner of said vessel was Wiel and Amundsen, A/S, of Halden.

Norway, and the remaining allegations of Article I are denied.

II.

Admits the allegations of Article II, except respondent and claimant believes and alleges the S.S. Romulus was at the city dock in North Bend, Oregon, when what injuries, if any, were sustained by libelant.

III.

Denies all allegations in Article III.

IV.

Lacks sufficient information and knowledge to form a belief as to the truth of the allegations contained in Articles IV, V, VI, and VIII, and therefore denies the same.

V.

In Article IX denies all and singular the premises are true, but admits, if true, they are within the admiralty and maritime jurisdiction of this Honorable Court.

VI.

For its further, separate and affirmative answer and defense, respondent and claimant alleges that if libelant was injured as alleged, in his libel, said accident and injuries were caused solely or contributed to by libelant's own carelessness and negligence.

Wherefore, respondent and claimant prays that the libel herein be dismissed with costs, and that the respondent and claimant may have such other

and further relief as the justice of the cause may require.

WOOD, MATTHIESSEN,
WOOD & TATUM.

Duly verified.

Service of copy acknowledged.

[Endorsed]: Filed October 29, 1953.

[Title of District Court and Cause.]

PRETRIAL ORDER

This is a libel in rem and in personam with attachment against the Steamship Romulus, claimed by Wiel & Amundsen, A/S, and a general appearance has been made by said company. This action is for damages and personal injuries allegedly sustained by libelant and is based generally on the theories of unseaworthiness of the vessel and the negligence of the shipowner.

Admitted Facts

I.

Libelant is a resident of the United States of the District of Oregon and resides in the City of Coos Bay, Oregon.

II.

That the S.S. Romulus was in the Port of North Bend, Oregon, and upon navigable waters of the United States and within the jurisdiction of this Court at the time of service of process herein.

III.

A general appearance has been made by said company. Said company owned said vessel.

IV.

That on or about September 26, 1953, libelant was engaged as a longshoreman by the Independent Stevedoring Company, a master stevedore, who was loading said ship at the City Dock in North Bend, Oregon. Libelant was an acting hatch boss on said date.

The S.S. Romulus is a lumber carrier vessel somewhat smaller than a liberty ship. That on said date of the accident the vessel was portside to the dock. Libelant went to work at 8:00 a.m. on the date of the accident. The accident occurred at approximately 8:30 a.m. Libelant's gang was assigned to No. 1 Hatch. At said time and place No. 1 Hatch had lumber cargo on deck in each wing of the vessel approximately 7 feet high. The gang was taking lumber in the square of the hatch. At that time, libelant was standing on top of the deck load on the port side. Libelant wanted to talk to the walking boss, the supervisor employee of Independent Stevedoring Company. Libelant stepped from the top of the deck load to the outside edge of the forepeak. Libelant then side-stepped along the outside of the forepeak holding onto the top rail. When he got almost to midship and to where the walking boss was, the top rail that he was holding onto pulled out causing libelant to fall backwards and downwards

a distance of approximately $7\frac{1}{2}$ feet to the main deck.

Said guard railing travels the entire afterend of the forepeak except for an opening approximately $2\frac{1}{2}$ or 3 feet wide amidships from which a ladder leads from the forepeak to the main deck of the vessel. The forepeak stands approximately 7 feet above the main deck. The guard railing consists of three sections on the port side of the ladder. Each section consists of two upright stanchions approximately 3 feet high and 68 inches apart. Three metal connecting rods three-quarters of an inch in diameter spaced at intervals of approximately one foot connect to the stanchions beginning at the top. These rods are all securely and permanently fixed in place in all sections of the port guard railing except the section immediately to the port of the midship ladder, and in this section the rods are attached to the upright stanchions in such a way that they can be unhooked and swung free. At this section the end of the railings away from the ladder can rotate as a hinge. At the other end the railings are secured in place as follows: The upright stanchion has an eye into which a bend of the railings, hereafter called hook, is inserted from above the eye. At the time of the accident this eye of the hook was plugged with paint. There was no cotter-key in it nor was there a cotter-key in the other two hooks constituting the second and third railing down. At the time of the accident there was no mausing near or on the end of the hook that pulled free and the other two

hooks. At the time of the accident this section was not actively in use by the ship. The eye through which there could be a cotter-key or mausing to keep the hook from pulling free was plugged with paint.

V.

That libelant has elected to pursue a remedy against a third person pursuant to the provisions of the Longshoremen's and Harborworkers' Act of the United States and has filed with the United States Department of Labor, Bureau of Employees Compensation, a notice of election to sue.

VI.

It is admitted that doctor, hospital and medical expenses in the sum of \$351.00 have been necessarily incurred to date as a proximate result of said accident.

VII.

It is admitted that libelant earned \$5,410.00 in the calendar year 1951 from longshoring, and earned \$5,182.00 by longshoring in the calendar year 1952.

Contentions of Libelant

I.

Libelant contends that at the time and place of said accident said vessel was unseaworthy and said respondent, its officers, agents and employees, were negligent in one or more of the following particulars which proximately caused said accident:

1. In failing to have a permanent affixed rail

instead of the rail which pulled out when libelant was injured.

2. In having a rail where the eye of the hook was covered over so that it could not be secured.

3. In failing to have a hooking device in said rail which would prevent it from pulling out when someone took hold of it.

4. In failing to have said rail secured with a cotter-key through the eye of the hook, or shackle.

5. In failing to inspect said rail which pulled out immediately prior to said accident.

6. In failing to warn this libelant that said rail was not secured.

7. In failing to have the hook end of the top rail secured with mausing.

II.

That as a proximate result of said unseaworthiness and negligence, this libelant sustained severe and permanent injuries and permanent impairment of his ability to work and perform labor, was caused pain and suffering and will be permanently caused pain and suffering in the future, was caused severe nervous shock, physical and mental pain and suffering, a severe tearing, twisting and wrenching of the muscles, tendons, ligaments, soft tissue, bones and nerves of his neck, shoulders and back, a severe cervical strain, a lumbar strain, permanent damage and injury to the sensory nerve fibres in the region of his left shoulder and damage to the occipital

nerves and all to his damage in the sum of \$30,000.00.

III.

That as the proximate result of said unseaworthiness of said vessel and the negligence of respondents, libelant lost wages to date in the approximate sum of \$3,650.00 and will lose further wages, and will incur further medical expenses.

IV.

Libelant contends that he was earning in excess of \$100.00 per week at the time of said accident, and that he was off work as the result of said accident and from the date of said accident to March 8, 1954, and since said March 8, 1954, has been working part-time only, and that all lost time from the date of said accident to the present time is the result of said accident.

V.

Libelant contends that at the time of said accident he was a healthy, robust and able-bodied man of the age of 35 years' capable of doing strenuous physical labor with a life expectancy under the Standard Mortality Tables of 33.48 years.

Contentions of Respondent

1. Denies all contentions of libelant.
2. Libelant's injuries were not caused by the negligence of the shipowner or unseaworthiness of the vessel.
3. Libelant was contributorily negligent due to

the unsafe way in which he chose to perform his work.

4. There were two safe and practicable ways in which libelant could have performed his work.

5. In choosing to perform his work unsafely, libelant was negligent and this negligence proximately caused libelant's fall and resulting injuries, if any.

Further Contentions of Libelant

Libelant denies all of the contentions of respondents.

Libelant's Exhibits

Nos. 1-A, 1-B, 1-C, 1-D, 1-E, 1-F, 1-G, 1-H, and 1-I—Photos.

No. 2—Dr. R. Bigg's medical notes, X-rays and records.

Nos. 3-A and 3-B—Hospital records and X-rays from Keizer Memorial Hospital.

(Unauthenticated.)

Respondent's Exhibits

No. 4—Pacific Coast Longshore Agreement.

No. 5—Pacific Coast Marine Safety Code.

Nos. 6-A, 6-B, 6-C, 6-D, 6-E, 6-F, 6-G, 6-H, and 6-I—Photos.

No. 7-B—Dr. Berg's medical notes, X-rays and records.

No. 8—Deposition of Libelant.

No. 9—Sketch of vessel's forepeak.

No. 10—Extract of deck log (unauthenticated).

No. 11—Stevedore Co. injury report.

No. 12—Libelant's medical records from Veterans' Adm.

The exhibits herein have been identified and received as pretrial exhibits, the parties agreeing with the approval of the court that no further identification of exhibits is necessary. In the event that said exhibits or any thereof, should be offered in evidence at the time of trial, such exhibits are subject to objection only on the grounds of relevancy, competency and materiality.

Expert Testimony

Libelant reserves the right to call expert witnesses. Respondent reserves the right to call expert witnesses.

This order represents the result of pretrial conferences held between the parties, their proctors and the judge presiding in open court.

It Is Hereby Ordered that the foregoing constitutes the pretrial order in the above-entitled cause and supersedes the pleadings in the within cause, but may be amended after signature or during trial only upon agreement of the parties or by order of this court to prevent manifest injustice.

Dated and Signed in open court this 8th day of June, 1954.

/s/ CLAUDE McCOLLOCH,

United States District Judge.

Approved:

/s/ FRANK H. POZZI,
Of Proctors for Libelant.

/s/ JOHN R. BROOKE,
Of Proctors for Respondents.

[Endorsed]: Filed June 8, 1954.

In the District Court of the United States
for the District of Oregon

No. 7202

ROY E. POTTER,

Libelant,

vs.

The S.S. ROMULUS, Her Engines, Tackle and
Gear, and Any and All Persons Claiming Any
Interest Therein, and WIEL AND AMUND-
SEN, A/S, of Halden, Norway, and J. B.
STAND of Oslo, Norway, and A/S LUDWIG
MAIVENCKELS REDERI of Bergen, Nor-
way, Owners and/or Charterers, and LATIN-
AMERICAN LINES, Operators and/or Char-
terers,

Respondents.

MEMORANDUM OPINION

The case is close, but I think it comes within the
framework of modern seamen's cases, both as to
unseaworthiness and negligence.

Dated July 2, 1954.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed July 2, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having come on for trial before me, libelant appearing in person and by and through Frank H. Pozzi of proctors, respondents appearing by and through Wood, Matthiessen, Wood & Tatum, and John R. Brooke of proctors, witnesses having been sworn and testified, exhibits having been admitted in evidence, argument of proctors having been had, and the Court being fully advised in the premises, hereby makes its findings as follows:

Findings of Fact

I.

That libelant is a resident of the United States and of the District of Oregon within the jurisdiction of this Court, and resides in the City of Coos Bay, Coos County, State of Oregon.

II.

That a general appearance has been made by respondent Wiel and Amundsen, A/S, and this Court

has general jurisdiction over said Company for the purposes of this cause. That said Company was the owner and operator of the said S.S. Romulus at all times herein mentioned.

III.

That the respondent vessel, S.S. Romulus, was in the Port of North Bend, Coos County, Oregon, and upon navigable waters of the United States, and within the jurisdiction of this Court, at the time of service of process.

IV.

That on September 26, 1953, libelant was engaged in working aboard said respondent vessel as a long-shoreman, by a master stevedore, to wit: Independent Stevedoring Company, and libelant was acting as hatch boss on said date. That said vessel is a lumber carrier, smaller than a liberty ship, and at the time of the accident was portside of the dock.

V.

That libelant sustained an accident aboard said vessel at Hatch No. 1 at approximately 8:30 a.m. on said date when an insecure railing gave way, causing libelant to fall 7½ feet from the forepeak to the main deck of said vessel, and that the cause of libelant's fall was the unseaworthiness of said vessel, and the negligence of respondent Wiel and Amundsen, A/S, the owners and operators of said vessel at said time and place.

VI.

That at the time and place of said accident respondent, Wiel and Amundsen, A/S, was negligent and the vessel was unseaworthy because the top rail was loose and was not affixed permanently or secured.

VII.

That at the time and place of said accident said vessel was unseaworthy and said respondent, Wiel and Amundsen, A/S, was negligent in failing to have a cotter-key or shaker or other device through said eye of the hook.

VIII.

I find that libelant has incurred doctor, hospital and medical expenses to date in the sum of \$351.00 as a proximate result of said accident.

IX.

I find that at the time of the happening of said accident libelant was earning in excess of \$100.00 per week and as a proximate result of said accident had lost wages to the date of trial in the sum of \$3,250.00, and will lose further wages.

X.

I find that as a proximate result of said negligence of said respondent company and the unseaworthiness of said vessel, and both, that respondent sustained said accident and as a proximate result thereof was caused severe pain and suffering, nervous shock, a severe tearing, twisting and wrenching

of the muscles, tendons, ligaments and soft tissue of the bones and nerves of his neck, shoulders and back, a severe and cervical strain, a lumbar strain, injuries to his body and neck, and impairment of his ability to work and perform labor. I find that at the time of the happening of the accident libelant was a healthy, robust, physically able man of the age of 35 years, capable of engaging in strenuous physical labor, and that he had a life expectancy under the standard mortality tables of 33.48 years.

XI.

I find that libelant did not choose an unsafe way in which to perform his work and that libelant himself was not negligent.

XII.

That libelant elected to pursue a remedy against a third person pursuant to the provisions of the Longshoremen's and Harborworkers' Compensation Act, and has filed with the United States Department of Labor, Bureau of Employees' Compensation Commission, notice of election to sue.

Based upon the foregoing Findings of Fact the Court makes the following:

Conclusions of Law

I.

That this Court has jurisdiction of the cause and the subject matter, and, that the respondent, Wiel and Amundsen, A/S, has submitted itself to the jurisdiction of this Court.

II.

That the injuries sustained by libelant in said accident of September 26, 1953, were caused solely by the negligence of said owners and operator of said vessel and the unseaworthiness of said vessel and its appurtenances.

III.

That libelant was not himself contributorily negligent.

IV.

That libelant is entitled to a Decree awarding him special damages in the sum of \$3,601.00, and general damages in the sum of \$10,000.00, and recovery of his costs and disbursements incurred herein.

Dated this 20th day of July, 1954.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed July 20, 1954.

In the District Court of the United States
for the District of Oregon

Civil No. 7202

ROY E. POTTER,

Libelant,

vs.

The S.S. ROMULUS, Her Engines, Tackle and Gear, and Any and All Persons Claiming Any Interest Therein, and WIEL AND AMUNDSEN A/S of Halden, Norway, and J. B. STAND of Oslo, Norway, and A/S LUDWIG MAIVENCKELS REDERI of Bergen, Norway, Owners and/or Charterers, and LATIN-AMERICAN LINES, Operators and/or Charterers,

Respondents.

DECREE

This matter coming on regularly for hearing before the Honorable Claude McColloch, Judge of the above-entitled Court, testimony having been adduced by parties, arguments having been made, the Court having made its findings of fact and conclusions of law, now, therefore,

It is Hereby Ordered, Adjudged and Decreed, that libelant, Roy E. Potter, have of and recover judgment against respondents, The SS Romulus, her engines, tackle and gear, and any and all persons claiming any interest therein, and Wiel and Amundsen A/S of Halden, Norway, in the sum of \$10.-

000.00 general damages, and the further sum of \$3,601.00 special damages, with interest at the rate of six (6%) per cent per annum from the date of this decree until fully paid, and

It is Further Ordered, Adjudged and Decreed, that libelant have of and recover judgment against respondents for his costs and disbursements taxed in the sum of \$.

It is Further Ordered and Decreed that upon payment of the Decree and costs and obligations taxed herein, that respondents, The S.S. Romulus, her engines, tackle and gear, and any and all persons claiming any interest therein, and Wiel and Amundsen A/S of Halden, Norway, and their sureties, shall be relieved from all further obligations from such stipulations as they may have filed in this cause.

Dated this 21st day of July, 1954.

/s/ CLAUDE McCOLLOCH,
United States District Judge.

[Endorsed]: Filed July 21, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Roy E. Potter and Peterson & Pozzi, his proctors.

Notice is hereby given that Wiel and Amundsen, A/S, as claimant of the S.S. Romulus and as re-

spondent, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final decree and the whole thereof entered in this cause on July 21, 1954, by which decree Roy E. Potter was awarded \$13,601.00 and costs against the vessel claimed by claimant, and this respondent.

Dated September 7, 1954.

/s/ LOFTON L. TATUM,

/s/ JOHN R. BROOKE,

WOOD, MATTHIESSEN,

WOOD & TATUM,

Proctors for Claimant and
Respondent.

Service of Copy acknowledged.

[Endorsed]: Filed September 9, 1954.

[Title of District Court and Cause.]

PETITION FOR APPEAL AND ORDER
ALLOWING APPEAL

Wiel and Amundsen, A/S, as claimant of the S.S. Romulus and as respondent, being aggrieved by the final decree entered in this cause on July 21, 1954, prays that it may be allowed to appeal from the said decree to the United States Court of Appeals for the Ninth Circuit.

Dated: September 7, 1954.

/s/ LOFTON L. TATUM,

/s/ JOHN R. BROOKE,

WOOD, MATTHIESSEN,

WOOD & TATUM,

Proctors for Claimant and
Respondent.

It is Hereby Ordered that the foregoing petition for appeal be, and the same hereby is, allowed.

Dated: September 9th, 1954.

/s/ CLAUDE McCOLLOCH,

United States District Judge.

Service of Copy acknowledged.

[Endorsed]: Filed September 9, 1954.

[Title of District Court and Cause.]

CITATION ON APPEAL

To Roy E. Potter and Peterson & Pozzi, his proctors.

Whereas Wiel and Amundsen, A/S, as claimant of the S.S. Romulus, and as respondent, has lately appealed to the United States Court of Appeals for the Ninth Circuit from the final decree rendered in the above-entitled cause on July 21, 1954, award-

ing damages to libelant, Roy E. Potter, and has given the security required by law.

You are therefore hereby cited and admonished to be and appear before the United States Court of Appeals for the Ninth Circuit at San Francisco, California, within forty days from the date hereof to show cause, if any there be, why the said decree should not be corrected and speedy justice done to the parties in that behalf.

Given under my hand at Portland in said district this 9th day of September, 1954.

/s/ CLAUDE McCOLLOCH,
United States District Judge.

Service of Copy acknowledged.

[Endorsed]: Filed September 9, 1954.

[Title of District Court and Cause.]

ASSIGNMENT OF ERROR

Wiel and Amundsen, A/S, claimant of the S.S. Romulus and as respondent appealing from the final decree entered in this Court and cause on July 21, 1954, makes the following assignment of error:

I.

The District Court erred in finding negligence against the respondent and unseaworthiness against the vessel and that such was the proximate cause of

libelant's injury, and in awarding damages in favor of libelant.

II.

The District Court erred in finding that the respondent was negligent and the vessel was unseaworthy because the toprail was loose and was not affixed permanently or secured.

III.

The District Court erred in finding that the respondent was negligent and the vessel was unseaworthy in failing to have a cotter key or shackle or other device through said eye of the hook.

IV.

The District Court erred in finding that the libelant did not choose an unsafe way in which to perform his work and that libelant himself was not negligent.

V.

The District Court erred in concluding as a matter of law that the injury sustained by libelant was caused solely by the negligence of said owners and operator of said vessel and the unseaworthiness of said vessel and its appurtenances.

VI.

The District Court erred in concluding as a matter of law that the libelant was not himself contributorily negligent.

VII.

The District Court erred in decreeing that libelant

have and recover from respondent and said vessel the sum of Thirteen Thousand Six Hundred One and No/100 Dollars (\$13,601.00) and costs.

/s/ LOFTON L. TATUM,

/s/ JOHN R. BROOKE,

WOOD, MATTHIESSEN,

WOOD & TATUM,

Proctors for Claimant and
Respondent.

Service of Copy acknowledged.

[Endorsed]: Filed September 9, 1954.

[Title of District Court and Cause.]

DOCKET ENTRIES

1953

Sept. 26—Filed libel in rem and in personam with foreign attachment.

Sept. 26—Filed stipulation for costs.

Sept. 26—Issued warrant of arrest and monition to marshal.

Sept. 26—Issued monition to marshal.

Sept. 29—Filed monition with marshal's return.

Sept. 29—Filed warrant of arrest and monition with marshal's return.

Oct. 12—Filed notice of general appearance.

Oct. 12—Filed claim of vessel.

Oct. 12—Filed stipulation to abide the decree and for costs.

Oct. 29—Filed answer of respondent.

1953

Nov. 18—Filed deposition.

Nov. 23—Entered order setting for pre-trial conference Dec. 7 and trial Dec. 8, 1953.

Nov. 30—Entered order striking from calendars.

1954

Mar. 29—Entered order setting for pre-trial conference Apr. 26 and trial Apr. 27, 1954.

Apr. 12—Entered order striking from trial on April 27 and resetting for trial on June 8, 1954.

Apr. 26—Entered order setting for pre-trial conference on May 31, 1954.

Apr. 26—Record of pre-trial conference.

June 2—Issued 2 subpoenas and 4 copies to attorneys for respondent.

June 7—Pre-trial conference had.

June 8—Filed petition for order for subpoena duces tecum.

June 8—Filed and entered order for subpoena duces tecum.

June 8—Record of trial by court and order continuing to June 15, 1954.

June 8—Filed and entered pre-trial order.

June 8—Filed memoranda brief of respondent.

June 15—Record of further trial by court and order setting for argument on June 16, 1954.

June 16—Record of argument and order taking under advisement.

July 2—Filed memorandum of court.

July 19—Record of hearing on proposed findings.

1954

- July 20—Filed respondents' requested amendments and deletions to proposed findings.
- July 20—Filed and entered findings of fact and conclusions of law.
- July 21—Filed and entered decree for libelant.
- July 26—Filed cost bill of libelant.
- Sept. 9—Filed petition for appeal and filed and entered order allowing appeal.
- Sept. 9—Filed citation on appeal.
- Sept. 10—Entered order sustaining libelant's objections to cost bill.
- Sept. 9—Filed notice of appeal by respondents.
- Sept. 9—Filed assignment of error.
- Sept. 9—Filed designation of parts of apostles.
- Sept. 14—Filed motion for order to transmit original exhibits to appellate court.
- Sept. 14—Filed and entered order to transmit original exhibits to appellate court.
- Sept. 17—Filed transcript of proceedings June 8 and 15, 1954.

United States District Court, District of Oregon

Civil No. 7202

ROY E. POTTER,

Libelant,

vs.

THE "S.S. ROMULUS," Her Engines, Tackle and Gear, and Any and All Persons Claiming Any Interest Therein, and WIEL AND ADMUNDSEN, A/S, of Halden, Norway, and J.B. STAND of Oslo, Norway, and A/S LUDWIG MAIVENCKELS REDERI of Bergen, Norway, Owners and/or Charterers, and LATIN-AMERICAN LINES, Operators and/or Charterers,

Respondents.

June 8, 1954, A.M.

Appearances :

FRANK H. POZZI, of
Proctors for Libelant.

JOHN R. BROOKE, of
Proctors for Respondents.

TRANSCRIPT OF TESTIMONY AND
PROCEEDINGS

Mr. Pozzi: May it please the Court, I would like to take up one matter before we commence this trial. I had planned on having Mrs. Betty Greenwald, who was the Assistant Superintendent of the Keizer Memorial Hospital in North Bend, to have her produce the medical records here this morning. I planned on taking the order this morning.

We planned on having the medical records here from the Keizer Hospital in North Bend this morning. Mrs. Greenwald was going to accept service of a subpoena and I was going to ask for an order of Court for the issuance of a subpoena.

However, I talked to Mrs. Greenwald last night by phone and learned that she was in bed, ill with a chronic kidney infection.

Therefore, I have reserved No. 3 in the pre-trial order for those records, and will ask the Court for an order for the issuance of a subpoena, and asking her to bring them next Tuesday morning. She said she could be back to work within a week.

The Court: Put on your witnesses. [2*]

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

ROY E. POTTER, Libelant,
produced as a witness in his own behalf, and being
first duly sworn, was examined and testified as
follows:

Mr. Pozzi: Your Honor, there is a lengthy stipulation of facts in the pre-trial order. Specifically, referring to Paragraph IV on Page 1, I think that will assist the Court a great deal. We have attempted to boil this down.

The Court: Mr. Clerk, give him an order for the production of the records next Tuesday. Will that involve the taking of some testimony?

Mr. Pozzi: I do not think so.

The Court: Other than identifying the records?

Mr. Pozzi: No.

The Court: Date it for next Tuesday, then. Go ahead.

Direct Examination

By Mr. Pozzi:

Q. Your name is Roy E. Potter and you are the libelant in this case? A. That is right.

Q. Mr. Potter, speak loudly so the Judge can hear what you have to say. How old are you at the present time? A. 36.

Q. At the time of the accident, September 26, 1953, how old were you then? [3]

A. 36; I will be 37 in June.

Q. 37 in June? A. Yes, June 12th.

Q. You are a married man and this is Mrs. Potter sitting here in the back of the courtroom, is that right? A. Yes.

(Testimony of Roy E. Potter.)

Q. You have two children, I understand, aged seven and four? A. Yes, sir.

Q. And you live where?

A. 858 South 11th, Coos Bay, Oregon.

Q. How long have you been a longshoreman?

A. A little over four years in the union.

Q. I understand you started longshoring in the year 1947? A. That is right.

Q. Going back for a moment, Mr. Potter, before you started longshoring, you were in the service during World War II and were wounded, is that correct? A. Yes, I was.

Q. What kind of wounds did you have?

A. Shrapnel wounds.

Q. Where were these shrapnel wounds?

A. In the forepart of my leg here (indicating).

Q. You have pointed at the upper part of your right leg, is that correct? A. Yes. [4]

Q. What was the general condition of your health immediately before this accident? Was it good or bad? A. I was in good health.

Q. Were you able to do the regular work of a longshoreman? A. Prior to this accident, yes.

Q. When you worked at longshoring, what was your job? A. I was a hold man.

Q. That means working in the bottom of the ship, loading or unloading, down in the hold, is that right? A. That is right.

Q. What gang were you working in at the time this accident happened? A. Gang 21.

(Testimony of Roy E. Potter.)

Q. How long had you worked in this Gang 21?

A. Approximately a year.

Q. I understand your gang had begun to work this ship at what is known as the pulp dock on September 22, the Tuesday before the accident, is that about right? A. Yes, that is about right.

Q. And I understand the ship shifted over to the City dock, the place where the accident happened?

A. Yes.

Q. The accident occurred about 8:30 in the morning, is that about right? [5] A. Yes.

Q. What time did you turn to that morning?

A. 8:00 o'clock.

Q. On that morning, on the day of the accident, your job was that of acting hatch boss?

A. Yes.

Q. Your hatch boss was ill, is that right?

A. That is right.

Q. And you were taking his place that day?

A. Yes.

Q. When you went to work at 8:00 o'clock in the morning on the day of the accident—that was a Saturday, was it not? A. Yes.

Q. When you went to work that morning, tell the Judge the general description of No. 1 hatch where you were assigned to work.

A. Well, we had a load of lumber in the wing, down to our coaming, and I was to keep a three-foot clearance on the ship because they were still filling the bottom.

Q. In other words, each wing of the ship had

(Testimony of Roy E. Potter.)

lumber up to the forepeak—— A. Yes.

Q. The square of the hatch was still open?

A. Yes. [6]

Q. And the ship was being filled with lumber?

A. Yes.

Q. The boys were just finishing off?

A. Yes.

Q. This ship lying portside to the dock?

A. Yes.

Q. Immediately before the accident, I believe we have stipulated, you were on the port side on top of the lumber, is that right? A. That is right.

Q. Since the gang had begun to work at 8:00 o'clock, had you been on any other part of No. 1 hatch besides the port side? A. No.

Q. I am going to hand you Libellant's Exhibits 1-A to 1-I, inclusive. Do these pictures correctly show the No. 1 hatch and part of the forepeak of the *Romulus*? A. Yes.

Q. You will note that those pictures show that there is some lumber on top of the square of the hatch, and also that the booms are down for No. 1 hatch. A. Yes.

Q. Just immediately before the accident, as I understand your testimony, there was no lumber on the square of the hatch, on top of the hatch, is that correct? [7]

A. That is correct, there wasn't, because this was early in the morning.

Q. The booms, of course, then, would be up?

(Testimony of Roy E. Potter.)

A. That is right.

Q. You were using those booms?

A. Yes, that is right.

Mr. Pozzi: If your Honor please, three of Mr. Brooke's pictures are merely enlargements of the same pictures. His exhibits are No. 6-A to No. 6-I, and the enlargements I refer to are No. 6-B, No. 6-H and No. 6-I. We would offer in evidence at this time for the purpose of illustration, the pictures, Libellant's Exhibits 1-A to 1-I——

The Court: In accordance with our usual practice, all exhibits are deemed to have been offered and are admitted in evidence subject to any objections that may have heretofore been stated or that may hereafter be stated prior to the final submission of the case.

(Testimony of Roy E. Potter.)

Introduction of Exhibits

Libelant's Exhibits

Number and Description

1-A to 1-I—Photographs.

2—Dr. Begg's Medical Notes, X-rays and records.

4—Pacific Coast Lognshore Agreement.
ords and X-rays. [8]

Respondents' Exhibits

Number and Description

4—Pacific Coast Longshore Agreement.

5—Pacific Coast Marine Safety Code.

6-A to 6-I—Photographs.

7-B—Dr. Berg's medical notes, X-rays and records.

8—Deposition of Libelant.

9—Specs of forepeak.

10—Extract of Deck Log (unauthenticated).

11—Stevedore company injury report.

12—Libelant's medical records from Veterans Administration.

LIBELANT'S EXHIBIT NO. 1-B



LIBELANT'S EXHIBIT NO. 1-F



LIBELANT'S EXHIBIT NO. 6-D



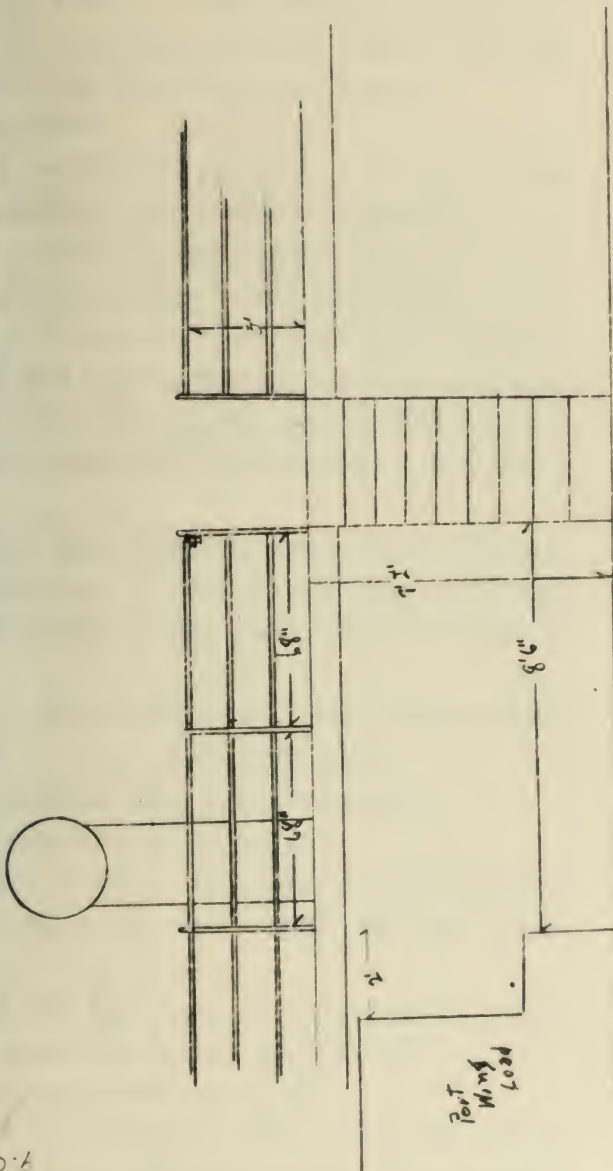
LIBELANT'S EXHIBIT NO. 6-H

Rest

~~PLANNING~~
DEFENDANTS

EXHIBIT 9

Case No. 72-57
IRA G. HOLCOMB
Superior



7.0

(Testimony of Roy E. Potter.)

Q. (By Mr. Pozzi): This vessel you were on I understand is somewhat smaller than a Liberty ship, an old World War I type of vessel?

A. That is right.

Q. Would you tell the Judge in your own words what happened, how the accident happened?

A. Well, I started over to the walking boss to find out what the markings would be on some of that lumber, because I was the hatch boss. This rail that I had hold of was supposed to be secured. I figured it was just as safe a way as any, because [9] we have to walk over to that at all times when we are down in the hold.

I got within a foot from the ladder when this rail twisted out from me. I couldn't hold on, and I had to fall to the deck. I was going there to talk to Marvin.

The Court: This Exhibit No. 6-D, is that where it happened?

A. Yes, right here.

Q. That is where you were standing?

A. Yes, I was over to the ladder.

Q. (By Mr. Pozzi): In other words, you had started from the port side. How did you walk across?

A. Well, I slid this foot over and held on tight. My toes was under there so I couldn't slip.

Q. Did you slip when you fell?

A. No, I never slipped. When that rail pulled out, it let me down; couldn't do nothing else; wasn't anything to grab on.

Q. You fell over backwards?

(Testimony of Roy E. Potter.)

A. That is correct.

Q. How did you land, Mr. Potter?

A. On my head and shoulders and down here on my hip and my back.

Q. You are pointing to the back of your head and back of your shoulders? A. Yes. [10]

Q. And the middle of your back?

A. Yes, up here (indicating).

Q. Were you knocked out?

A. I was out for just a little bit, because when I got up I was still a little hazy.

Q. What is the first thing you remember after you fell?

A. Trying to sit up and Doug was there with me—Mr. Clark.

Q. You mean E. L. Clark, the gentleman sitting here? A. Yes.

Q. Where was he immediately before you fell? Where was Mr. Clark standing?

A. He was about two or three feet from the railing, on the forepeak.

Q. He was on the forepeak?

A. Yes. He was hatch tender.

Q. He was hatch tender? A. Yes.

Q. Was he facing you or not facing you when you fell? A. You said if he was facing me?

Q. Yes. A. Yes, he was facing me.

Q. In relationship to Doug Clark, where was the walking boss whom you were going up to see about the markings? A. He was right by the ladder.

(Testimony of Roy E. Potter.)

Q. Was he on the forepeak? [11] A. Yes.

Q. That is, you were just about to take another step and you were going up to him and start talking?

A. That is right.

Q. Did you, yourself, inspect the railing after you were hurt? Did you, yourself, look it over?

A. No, I didn't, but the steward did.

Q. All you know is that the railing pulled out?

A. That is right.

Q. Have you seen railings like that on other vessels? A. Yes, I have.

Q. What is the custom as to the ships securing those railings, if there is one?

A. When they are not in use and they are removable——

Mr. Brooke: For the purpose of clarity, are you speaking about the one that pulled out, or the whole section?

Mr. Pozzi: The top railing.

Mr. Brooke: The whole section along there, or just this particular section?

Mr. Pozzi: The section that pulled out.

Mr. Brooke: Did you understand that when he asked you the question?

The Witness: Yes, I did. Anything that is removeable is ship's gear and when we are not working and that is not in use, it is supposed to be secured; should have a chain or a [12] shaker to hold it in or a pin in there to keep it from slipping out.

Q. (By Mr. Pozzi): By "pin" do you mean a cotter key?

(Testimony of Roy E. Potter.)

A. Yes, or something similar to that.

Q. My question was directed to that. Was there a custom that a ship securing that, as you have observed on other vessels?

A. Yes, was supposed to be.

Q. Have you ever seen any of them tied off with mousings? Have you ever seen any?

A. I have seen some that was tied.

Q. Tied with lines?

A. Yes, so that they wouldn't slip out.

Q. Did anyone warn you before the accident that that railing was not secured? A. No.

Q. You mentioned a pin. Would you state whether or not you meant a cotter key?

A. That would be it, a cotter key that slips in that hole.

Q. After you fell, did Doug Clark help you up?

A. Yes.

Q. After you fell and Doug Clark helped you up to the forepeak, then what did you do?

A. I stayed around for a little bit and Marvin said, "How do you feel?" I said, "I don't know yet," because, you know, I was [13] still a little hazy.

The Court: How far did he fall?

Mr. Pozzi: It is 7 feet, 2 inches, your Honor, from where his feet were plus the length of his body to his head.

Q. How tall are you? A. 5 foot, 10½.

Q. When you landed on the deck, do you know

(Testimony of Roy E. Potter.)

yourself what you landed on besides the deck, if anything?

A. There was some peaveys laying there. I was bound to hit one or two of them, but that wasn't in my back.

Q. I understand you fell hard enough that it bent a steel hook, a cargo hook, that was in your hip pocket?

A. That is right.

Q. After you stood around for a while, where did you go? What did you do? Tell the Judge.

A. I went up to the hall and got an accident report and had that filled out. Then I went to the hospital and had some X-rays taken by Dr. Albertson.

Q. That is, the Keizer Memorial Hospital?

A. Yes. He said I couldn't work, so I went down to the ship and got hold of Marvin and notified him I couldn't work any more, and one of the boys took me to the hospital and he went to work in my place.

Q. Some man took you up to the hospital and brought you down to the ship to tell Marvin—— [14]

The Court: Identify him by name. Who is Marvin?

Q. (By Mr. Pozzi): When you say "Marvin" you mean the walking boss?

A. Yes, that is right.

Q. After you reported you couldn't work and you got a replacement, where did you go then?

A. I went home then. I had one of the boys drive me home.

Q. When you finally got home, how did you feel?

(Testimony of Roy E. Potter.)

A. Not very good, I will tell you.

Q. What was the trouble?

A. My head was starting to ache, then, and my back was starting to show up hurting.

Q. How about your neck and shoulder?

A. Yes, right in through here was stiff.

Q. You are pointing to the back of your neck?

A. Yes, right through here (indicating).

Q. How about the injury to your shoulder?

A. My left shoulder has been awful sore. It is getting a little better now.

Q. After you got home, what did you do?

A. I went to bed. My wife put me in bed.

Q. About what time did you get home?

A. Around 1:00 o'clock.

Q. I understand when you were at the hospital that morning you had quite a wait, is that correct? [15]

A. Yes, sir.

Q. Then you went home and went to bed about 1:00 o'clock on Saturday afternoon?

A. Yes.

Q. When did you next see a doctor?

A. Sunday morning.

Q. Where did you see him?

A. Over at Keizer's. I saw Albertson again. I had a pretty bad headache, so I went over to see him.

Q. How did you get over to the hospital?

A. A neighbor of mine took me over.

Q. What kind of shape were you in so far as your neck and back and general condition were concerned?

A. It was a little sorer Sunday than it was Saturday.

(Testimony of Roy E. Potter.)

Q. After you saw Dr. Albertson on Sunday morning at the hospital, what did you do then? First, what, if anything, did he do for you?

A. I told him my head was hurting pretty bad and he said, "You had better go to bed for a little bit."

Mr. Brooke: I object to any statement of what the doctor told you. You can tell what treatment he gave you, but not what the doctor said.

The Witness: He didn't give me no treatments at that time.

Q. (By Mr. Pozzi): Did he put you in bed at the hospital? [16]

A. Yes.

Q. And you stayed in the hospital on that day, is that correct?

A. Yes.

Q. Then what did you do?

A. I was at home that evening. I went to bed at home and my wife called Albertson.

Q. Then, as I understand, the next morning Dr. Albertson then referred you to Dr. Harris, an orthopedic surgeon?

A. Yes, I went to Dr. Harris on Monday.

Q. What did Dr. Harris do?

A. He took three X-rays of my head and he said, "You have got to go to the hospital."

Q. That is hearsay. Have you ever been a witness before, outside of the taking of your deposition?

A. That is the only time, only in the Army.

Q. The Army is a little different; but you are not supposed to say what someone else told you. You

(Testimony of Roy E. Potter.)

were rehospitalized, then, the following day, Tuesday morning? A. Tuesday morning, yes.

Q. And you were in the hospital until the end of the week, is that right? A. That is right.

Q. What did they do for you in the hospital?

A. Tuesday morning, when I turned in, they put me in traction. [17]

Q. What kind of traction? Just describe it.

A. On my head. They had a support lying around here (indicating), with a pillow under it here (indicating), and a weight went down from it. In other words, they were trying to stretch it, I guess.

Q. Did you remain in traction all the time you were in the hospital? A. Yes.

Q. Did they do anything else for you? Did they give you any shots or medicines?

A. They gave me some pills at night so I could sleep. It was pretty uncomfortable, that stuff was.

Q. After you got out of the hospital, what kind of treatments or care did you have?

A. Well, I took treatments at Dr. Harris' office every day, and then he put that collar around my neck to hold my chin up.

Q. He finally put you in a neck harness, is that right? A. Yes.

Q. And it held your neck stiff?

A. That is right.

Q. And held your head up? A. Yes.

Q. Do you know when it was he finally let you take that harness off?

(Testimony of Roy E. Potter.)

A. I believe it was two or three weeks after he put it on; [18] it was right around there; I don't remember what the date was.

Q. Were you referred by Dr. Harris to Dr. Roderick E. Begg for consultation by him here in Portland? A. Yes, I was.

Q. In November? A. Yes.

Q. When you went up to Dr. Begg in November, were you still wearing the harness? A. Yes.

Q. You saw Dr. Begg, I believe, November 13, 1953. How much longer after that were you wearing the harness? About how many days or weeks?

A. I really couldn't say truthfully.

Q. All right. If you don't know, don't try to say. Was this neck harness you wore comfortable?

A. Well, it was more comfortable than with the heavy cast on there.

Q. After you got out of the harness, which was some time after you saw Dr. Begg, what was your condition? How did you feel?

A. Well, I still had to keep taking treatments. My head just hurt.

Q. You were still under treatment for your back, neck and head? [19] A. Yes.

The Court: Do you want to put your doctor on?

Mr. Pozzi: Yes, if your Honor please.

(Witness temporarily excused.) [20]

DR. RODERICK E. BEGG

produced as a witness on behalf of Libelant, and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pozzi:

Q. Dr. Begg, you are a regularly licensed and practicing physician and surgeon in Portland, State of Oregon? A. Yes.

Q. You are with the office of Dr. Chuinard and Dr. Noall? A. Yes.

Q. Do you have a specialty? A. Yes.

Q. What is your specialty?

A. Orthopedic surgery.

Mr. Pozzi: Do you admit the doctor's qualifications?

Mr. Brooke: Yes.

Q. (By Mr. Pozzi): You saw Mr. Potter, the libelant in this case, on what date?

A. On November 10, 1953.

Q. At whose request did you see him?

A. Dr. Norman Harris.

Q. Do you know Dr. Harris personally?

A. Yes.

Q. He is an orthopedic surgeon at Coos Bay and in that area? A. Yes, that is right. [21]

Q. The only one there? A. Yes.

Q. Dr. Begg, just state to the Court the history of Mr. Potter, and what your examination consisted of.

A. This patient's chief complaint was pain in his

(Testimony of Dr. Roderick E. Begg.)

neck and in his back and the back of his head and over the eyes, which he stated followed an accident which he had on the 26th of September which happened when a railing on board a ship gave way, causing him to fall. He estimated the distance was approximately 10 feet. He stated he hit on the back of his head and neck. It dazed him and he was unconscious following this accident. He regained consciousness—he does not know for sure how long it was, but it was a little while; but he was able to get up and walk afterwards; and he was taken to the hospital in—I am not sure—it was in Coos Bay, I believe—but it was the Keizer Hospital, and he was examined there by the local physician and was X-rayed.

Then this doctor referred him to Dr. Harris and, as I understand, he placed him in traction and also placed him in a cervical support after the traction was removed and, owing to the fact that his pain persisted, he was referred to me.

The patient stated further that he had a headache at the base of his skull that came forward in the region of the eyes, at the time I first saw him; and also he had a sensation, [22] he stated, as if his arms were going to sleep.

He was wearing a neck support at the time which he said he did not use all the time but used most of the time because it seemed to give him definite relief.

Q. Go ahead.

A. He further stated that he had pain in his back which had improved but was still persistent.

(Testimony of Dr. Roderick E. Begg.)

On my examination of him I removed the neck support. There appeared to be some very definite tenderness to pressure along the posterior or back part of the head and the upper part of the neck, the occipital region.

His motion was fairly free but guarded.

Q. Of what significance is that, being guarded?

A. He was fearful, probably, of pain, or getting some definite pain, if it was moved too freely after being supported in a brace.

The median, ulnar and radial nerves were found to be unaffected. That is in the cervical area, the neck region.

There appeared to be some decrease in sensation over the top of the left shoulder area and down on the arm to about the region of the insertion of the deltoid muscle. The lower arm appeared to be good, as far as sensation was concerned.

The cranial nerves appeared to be good—appeared to be functioning normally to gross test. [23]

Muscle strength in the upper extremities appeared to be within normal limits. Reflexes in both upper extremities were also normal.

He complained of back pain localized in the lumbar area. Back motion was reduced slightly, and the patient complained of discomfort in extremes of motion.

There was no significant muscle spasm noted in this region at the time of the first examination.

The reflexes in the lower extremities were normal with the exception of the Achilles reflex on the right,

(Testimony of Dr. Roderick E. Begg.)

which was absent. There was noted at that time some shortening of the right leg and atrophy of the thigh and calf muscles. That is, on the right side. However, that had been present since a prior accident, an old injury to the sciatic nerve in the upper thigh region during World War II. This reflex, he stated, had been absent ever since this injury to the sciatic nerve, due to shell fragment wounds.

X-rays furnished by Dr. Harris' office and additional X-rays taken in Portland revealed no evidence of bone or joint pathology, both in the AP, lateral and odontoid views in the cervical region, and this was within normal limits.

My diagnosis was cervical strain, lumbar strain, and decreased sensation over the top of the left shoulder as a result of strain and probably resulting edema of the sensory nerve fibers in this [24] region.

Q. You suggest, then, in your report, physiotherapy which would include heat and massage, is that right? A. Yes.

Q. Doctor, first as to cervical strain, what is that?

A. That is a tearing or stretching of some of the ligaments in the cervical region or muscles or both. It can be a combination of the muscles and ligaments, or it can be one and then the other. The severity depends upon the amount of stretching or tearing that takes place.

Q. Assuming that this man was on a walk seven or eight feet above—seven feet five inches—above

(Testimony of Dr. Roderick E. Begg.)

the steel deck of a vessel, and that he fell backwards that distance and lit on the back of his head and shoulders and upper back, do you have an opinion as to whether or not your findings here were related to that accident?

A. Well, it could very well be. It could be even more severe than I found it.

Q. Assuming further that Dr. Harris made a tentative diagnosis of a cervical disk——

Mr. Brooke: There is nothing in the record on that.

Mr. Pozzi: I am going to tie that up. I recognize there is nothing in the record on it, your Honor.

The Court: Go on.

Q. (By Mr. Pozzi): Assuming there was a tentative diagnosis by Dr. Harris of a cervical disk in the upper back, what significance [25] would that have in so far as your findings are concerned?

Mr. Brooke: I object to that question for the record.

The Court: Overruled.

Mr. Brooke: I object on the ground it is concerned with facts not in evidence.

The Court: Overruled. Answer the question.

A. Well, if you have a tear severe enough, a severe enough injury in the neck region, you can definitely easily injure the disk or cushion that is between those vertebrae, because when the supporting structures give way that disk or cushion can be displaced or ruptured with very little more trauma or the same amount of trauma.

(Testimony of Dr. Roderick E. Begg.)

Q. (By Mr. Pozzi): This pain or headache which he described to you as starting in the back of the head and as coming up over the head toward the eye, what causes that? Medically, what is the explanation?

A. The nerves that supply the back of the head on the outside come from the upper portion of the neck itself; they radiate up; the nerves come up over the back of the head, and any time that there is a stretching or tearing or even swelling or edema or hemorrhage in that region or in the region of these nerves, you will get pain, and that can produce headache in the back of the head, and it comes up over the eyes, and that is something we often find coming when we have occipital [26] pain. Why it comes I don't know, but when we get severe headaches in the back of the head we often get a headache in front, over the eyes.

Q. These nerves you refer to do not extend over the eyes? A. No.

Q. But it is very common, when you find they have this severe type of headache, that they have pain that often extends over to the top of their eyes, is that correct? A. Yes.

Q. What surface are you referring to?

A. Well, over the occipital——

The Court: You do not need to go into that. There is no point about that.

Q. (By Mr. Pozzi): Concerning the lumbar strain, the second part of your diagnosis, what was that based on?

(Testimony of Dr. Roderick E. Begg.)

A. Well, based on the history and physical findings at the time I saw him.

Q. Referring to the decreased sensation over the top of the left shoulder as a result of strain and probably resulting edema of the sensory nerve fibers, you found, as I understand, loss of sensation in the left shoulder which extended down the deltoid, is that correct? A. Yes.

Q. What is meant by "edema of the sensory nerve fibers"?

A. That is just one of the possibilities as to the cause of [27] this loss of sensation. It is the same thing that causes the headache, due to some injury in or around that nerve where it comes out through the vertebral column.

Q. Doctor, when did you next see Mr. Potter?

A. On the 26th of May this year.

Q. Did you again examine him? A. Yes.

Q. Go ahead and tell the Judge what you found.

A. His complaint still was that the headache had persisted, probably not as bad, he stated, as before, but it was still present; he stated that it started in the upper neck and radiated up over the top of his head as when previously seen.

He had some pain in the upper dorsal—that is near the base of the neck—and also in the lumbar area.

Examination showed considerable improvement. He did not have any loss of sensation over the shoulder; his muscle power was good; he had increased his range of motion. However, he still com-

(Testimony of Dr. Roderick E. Begg.)

plained of discomfort on extremes of motion in his leg, back and also in the cervical region.

Q. Doctor, assuming that this man was injured on September 26, 1953, according to the history which has previously been related by you; you first saw him in November, 1953, and found the conditions as you have stated; then you saw him a few days ago and examined him again.

Do you have an opinion as to whether or not it is [28] reasonably probable that this man has sustained some permanent injury as a result of this accident?

A. Once these ligaments are badly stretched or torn, it means it leaves a vulnerable place where it can recur; also, these ligaments that are injured do not snug up as tightly and as firmly as they did before, and that might be a probable source of pain, and also a probable source of reinjury.

Q. Then you would state it is reasonably probable there is some permanent injury? A. Yes.

Q. It is reasonably probable his ability to work would be permanently impaired?

A. Impaired to some extent, yes.

Q. Assuming that this man was unable to go back to work from the time of the accident, September 26, 1953, until March 8, 1954, when he did go back to work and took lighter work, what is known as dock work where he did not have to do very much lifting or straining; that he was only able to work one or two or three days a week for the balance of

(Testimony of Dr. Roderick E. Begg.)

March and into April, and by the end of April he got to a point where he was unable to work at all and has not been able to work since that time, although the rest period in this last month has caused him to improve again, of what significance is that, in so far as whether or not he should go back to work or should continue to stay off work while he is improving? [29]

Mr. Brooke: For the record, your Honor, I object to that question because it has to do with matters not before the Court.

Mr. Pozzi: I will connect it up, your Honor.

The Court: Answer the question.

The Witness: Do you wish me to proceed?

The Court: Yes, Doctor.

The Witness: Well, that would be a suggestion, certainly, in the patient's history, that certain types of work might have to be avoided, particularly in this recovery period. The permanency of that cannot be told exactly; it could only be estimated, I do not know as one could make an exact estimate, but it would be indicative that probably he had found lighter work during the period of recovery, and particularly if he improved when he was at rest again, it would point to that fact.

Mr. Pozzi: Perhaps it is impossible for you to answer that. Could you anticipate or estimate, rather, what would be reasonable as to his maximum healing period?

A. In spine injuries we often give them a year;

(Testimony of Dr. Roderick E. Begg.)

often following surgery, following a bad injury, occasionally they will take longer.

Mr. Pozzi: You may inquire. [30]

Cross-Examination

By Mr. Brooke:

Q. Doctor, when you first saw Mr. Potter you made a diagnosis at that time. I did not hear it all, I fear. Would you mind repeating the diagnosis you made?

A. Cervical strain, lumbar strain, and decreased sensation over the top of the left shoulder.

Q. For that condition you recommended heat treatments and massage?

A. Yes, physiotherapy, and Sayre stretchings.

Q. Physiotherapy?

A. And Sayre stretchings.

Q. Did you find any indication of tenseness, muscle tenseness or hypertension in this man?

A. I would not have found any hypertension because that is usually referred to high blood pressure.

Q. What I mean is nervousness or tenseness in the man?

A. Well, not particularly. I found tenderness on the original examination.

Q. Muscle tension, I mean?

A. Not that it made any impression upon me. no.

Q. If this man had a condition of muscle tension and nervousness, could that explain the nerve pain he had across the back of his neck and into his head?

(Testimony of Dr. Roderick E. Begg.)

Would the pressure on the nerve be the result of tightening of the muscles? [31]

A. There is such a thing as a person who is under tension, because the tension is the result of pressure or loss of blood around these nerve roots which will cause some type of pain.

Q. Is that also the case with the nerves in the shoulder where this decreased sensation was found? Would it be caused by muscle tension in that area?

A. Not very well. I have never run onto any type of patient that I have had any contact with who complained of such a thing. I do not recall one.

Q. The nerves could be under pressure as a result of muscle tenseness in the shoulder, could they not?

A. Yes, they could be, only that would come out a little lower in the neck, and we would get less likelihood of specific changes in the nerve due to tension. We are more likely to have it from localized pressure or edema or swelling around the nerve.

Q. In your history you pointed out the man stated to you that he had been injured in the war, when he was hit by a shrapnel in the leg. Did he tell you that he received some disability allowance from the Veterans Administration?

A. I do not recall that I asked him. I would assume if he had been hit by a shell fragment and it had damaged the sciatic nerve he is probably receiving something, but I do not recall specifically asking him about that.

(Testimony of Dr. Roderick E. Begg.)

Q. Did you, during the course of your examination of this [32] man, refer to any of the Veterans Administration medical reports? A. No, sir

Q. As to that injury? A. No.

Q. Or as to his condition as they found it?

A. No, sir.

Q. I notice you said you made your diagnosis of lumbar strain based on the history and your physical findings. What were your physical findings as to that?

A. He showed a decreased amount of range of motion in his back, complained of tenderness on pressure in the muscle areas of the back; also complained of pain on extremes of motion, pain to his low back.

Q. Primarily, those are subjective findings, are they not, Doctor?

A. Partly so, except range of motion probably is not.

Q. That is about the only objective finding, isn't it, Doctor?

A. That is true. Of course, I examined him several months after his injury, too.

Q. There were no fractures or dislocations as evidenced by the X-rays?

A. That is right. If they were present, that would make a far more complicated diagnosis. [33]

Q. I also have it noted here that you told Mr. Pozzi there was edema. Will you explain that?

A. I am not saying here that there was edema.

(Testimony of Dr. Roderick E. Begg.)

That is in explanation of what could produce this type of disability; for instance, decreased sensation as a result of injury.

Q. What does edema mean? A. Swelling.

Q. Increased content of fluid in the tissues per square inch more than normal?

A. Cubic inch, I should say.

Q. When I asked you whether this muscle tension on the nerve might explain—that could be another explanation for the loss of sensation?

A. Well, I certainly never made any diagnosis of tension.

Q. Yes, I understand.

A. So I couldn't quite go along with you on that.

The Court: Do you want the doctor to come back after lunch?

Mr. Brooke: I do not think I have many more questions.

The Court: Five minutes?

Mr. Brooke: Yes, at the most.

Q. You are not sure just exactly what caused the decreased sensation in the left shoulder?

A. From the standpoint of trauma, which this patient had, and we had a history of, I have no history of any anxiety [34] tension, and I do not recall ever seeing a localized area even in that one shoulder, so I am explaining that from my standpoint that was due as a result of this injury that the patient gave me a history of having had, that is, this tearing or stretching of the ligaments and mus-

(Testimony of Dr. Roderick E. Begg.)

cles, or both—it can be one or the other or both, with the resulting scar tissue which was due to occur, or at least edema and swelling, which will attack the insulation on the nerves that come out of that area in the shoulder. It can have a little tingling or numbness, and that can stay for several months until the swelling is entirely out of there.

Q. That will go away eventually?

A. I didn't find it on my last examination.

Q. As to the examination which you made of this man's leg, you say he had no reflex—that the reflexes were normal with the exception of the Achilles reflex on the right, and he had some scar tissue in his leg; nevertheless, the man was able to perform work as a longshoreman without any apparent problem. I think you said that there is some disability here, and you characterized that as small——

A. You mean in his leg?

Q. No, the injury he sustained on this vessel.

Mr. Pozzi: Objection, your Honor. He has not characterized it as small.

Mr. Brooke: I am trying to find out. [35]

Mr. Pozzi: That is vague and indefinite.

The Court: Answer.

A. Well, I don't know as I could use the word "small."

Q. (By Mr. Brooke): I will rephrase that. You said the recovery period may be as much as a year?

A. Yes.

Q. At the end of that time do you believe he will

(Testimony of Dr. Roderick E. Begg.)

be able to go back to work, back to longshoring work? A. I believe so.

Mr. Brooke: That will be all.

(Witness excused.)

(Recess until 1:30 oclock p.m.) [36]

ROY E. POTTER

Libelant, having previously been duly sworn, resumed the stand and further testified as follows:

Direct Examination

(Continued)

By Mr. Pozzi:

Q. Mr. Potter, it is stated in the admitted facts that you earned \$5,410 in the year 1951 from longshoring? A. That is right.

Q. And \$5,182 in the year 1952?

A. That is right.

Q. Was all of that income from longshoring?

A. Yes.

Q. You had no other job outside of longshore work? A. No, that was all.

Q. In 1953, immediately before the accident on September 26, what would your earnings run per month during that time on an average?

A. Well, it was \$3,500 up until September when I got hurt.

Q. You had earned \$3,500 from January of 1953, until the time you were injured? A. Yes.

Q. After you saw Dr. Begg and went back to

(Testimony of Roy E. Potter.)

Coos Bay, what [37] course of treatment was followed, in so far as you were concerned?

A. Neck stretching exercises mostly.

Q. How often did you have those?

A. Every day, six days a week.

Q. You saw the doctor quite regularly up until March when you went back to work, is that right?

A. Well, when I first went back I had to see Dr. Harris, and then the nurse gave me the treatments.

Q. What was the first day after the accident you worked? A. March 8th.

Q. 1954, is that right? A. Yes.

Q. What kind of work did you try to do when you went back? A. Dock work.

Q. Tell the Judge just briefly what kind of work that was.

A. Well, that is hooking up on the dock and slipping loads, and like that, but I only worked two or three days a week. That is all I could take.

Q. Why didn't you work more?

A. Because it bothered me. If I worked three days consecutive I could lay off the rest of the week and start in again Monday.

Q. It bothered you in what way?

A. My back at that time was still bothering me, and my [38] headaches—I still had them.

Q. How is your neck?

A. It is still a little sore but better than it was, though.

Q. You worked two or three days a week the rest of March? A. Yes.

(Testimony of Roy E. Potter.)

Q. Did you work two or three days a week during April? A. Yes, part of the weeks I did.

Q. What happened if you continued to work? You said you worked a part of the week——

A. Well, I think there was two weeks that I only worked two days; the other two, I think it was three days.

Q. How was your condition in April?

A. It was bothering me quite a bit, so I laid off all during the month of May.

Q. Were you getting worse? A. Yes.

Q. So you laid off? A. Yes.

Q. Since you laid off, have you gotten better or worse?

A. I have gotten better since I laid off.

Q. At the present time, let's start with your head: You still have these headaches?

A. I still have them, but they are not as frequent as they were. In other words, I do not have as many since I laid off.

Q. Do you have one at least every day, at least one every [39] day?

A. Sometimes I have two—some days I have two; other days I may not have one.

Q. How long do they last when they come?

A. Sometimes they last an hour or two.

Q. Where do they start?

A. Right back here (indicating), and work up.

Q. By "back here" you have put your hand to the base of your skull? A. That is right.

(Testimony of Roy E. Potter.)

Q. How is your neck? Do you have any pain in your neck now? A. Yes, I do frequently.

Q. I notice for instance, when you turn your head back to the Judge, you turn your body. Does your neck hurt you if you try to do that?

A. Yes, it does.

Q. Where does it hurt? Can you show by placing your hands there?

A. It starts right here (indicating), when I turn, right where my shoulders are, my left shoulder.

Q. Your left shoulder, as I understand, is pretty good now, is that right?

A. It is a lot better since I laid off.

Q. How about your back, the middle or lower part of your [40] back? How has that got along since you laid off?

A. That is better, too. It is coming along. It is just going to take time.

Q. During 1951 and 1952 and up until the time you were hurt, about how many days a week would you average working?

A. In 1951 I worked pretty steady, at least six days a week. Of course, sometimes we might work 4 straight and then be off two or three.

Q. At any rate, you had pretty high earnings during those years, didn't you?

A. Yes, that is right.

Q. You figure about an average of six days a week? A. Right.

Q. You figure about six days a week would be about right? A. Just about right, yes.

(Testimony of Roy E. Potter.)

A. I was going over to see Mr. Girt, the walking boss. [43]

Q. Up on the forepeak?

A. That is right.

Q. Isn't it true, Mr. Potter, you could have stepped from the railing onto the forepeak—excuse me—from the deckload, over the railing on the forepeak?

A. You can't step over it. You have got to step up and get over it.

Q. You could have gone over it?

A. I could have.

Q. From the top of the deckload, on the inshore side, down several feet there is a shelf or ledge, is there not? A. That is right.

Q. How wide is that, approximately?

A. Approximately three foot.

Q. About how high is it?

A. I would say it was five or six foot.

Q. I mean, up from the main deck.

A. You mean up to the top of the deckload?

Q. No, I mean from the main deck up to the shelf or ledge.

A. Well, I would say that was three foot or right close to it.

Q. So it was also possible for you to have stepped from the deckload down to this shelf, down to the main deck, across the main deck and up the ladder?

A. You couldn't step from this deckload down to that. [44]

(Testimony of Roy E. Potter.)

Q. That is a route you could have taken? Is that a route you could have taken?

A. That is a route you could have taken if you want to take a chance on falling into the hatch or something else.

Q. Let me put it this way: Was there a space between the after end of the forepeak and the square of the hatch? A. There is a space, yes.

Q. So you could have stepped from the shelf or ledge down to the main deck?

A. You could have stepped over, maybe.

Q. Yes.

A. But you couldn't step from the deckload.

Q. As I understand it, you have a contention here that there was not any mousing——

A. There was no pin in it, if that is what you mean.

Q. You know what I mean by "mousing"?

A. It was not secured.

Q. Do you know what I mean by "mousing"?

A. I don't know what you are referring to.

Q. Twine wrapped around it.

A. No, there wasn't.

Q. When you went out along this after edge of the forepeak, you couldn't see whether there was any mousing there or not?

A. No. I figured there was a pin in that. I figured it was safe, a safe route to take. There was supposed to have [45] been.

Q. Had you worked this ship before?

A. Yes.

(Testimony of Roy E. Potter.)

Q. When was that?

A. We started down at the pulp mill. I think it was two years ago when I worked it. That was the first time I had worked No. 1 hatch, though.

Q. You had worked this ship before, two years ago, but you had not worked No. 1 hatch?

A. No, just that week when we started at the pulp mill.

Q. That week, then, was not two or three years ago, was it?

A. No, that was the week I got hurt.

Q. Two years ago where did you work on this ship? A. I think it was No. 4 hatch.

Q. When you started to work this ship about a week before, you say you had not worked in No. 1 hatch? A. No, I hadn't.

Q. Had you worked No. 1 hatch at all prior to the morning of this accident? A. No.

Q. That was the first time you had ever worked No. 1 hatch? A. That is right.

Q. That morning? A. Yes.

Q. As I understand it, you stated you were about one foot [46] from this amidships ladder when the rail came out?

A. Approximately one foot. It might have been a foot and a half, but it happened so fast I can't judge it.

Q. Did you try to grab the hand rail of the ladder?

A. I never had a chance, or I would have.

Q. Do you know James White who works for

(Testimony of Roy E. Potter.)

the Independent Stevedoring Company, Jim White?

A. I don't know if I know him or not.

Q. A tall fellow with straight black hair?

A. What does he do for Independent?

Q. I think he is a runner. He brings things out to the ship and back.

A. I know they have about two or three new ones since I was back there.

Q. Do you remember a man who was doing a job on the ship when you were injured?

A. No, I don't recall. They had two or three there at that time, but I don't recall which one brought the gear over.

Q. Do you remember making a statement to one of these men who worked for the Independent Stevedoring Company on the dock immediately after this accident to the effect that, "I guess this will knock some sense into my head"?

A. No. If that was Mr. White, he wanted to know how my head felt.

Q. Do you remember saying that to him? [47]

A. Yes, I remember talking to him.

Q. Do you remember saying that?

A. He just wanted to know how I felt and I told him, "Maybe it will knock some sense into my head," because I got a rap on my head and I was more or less hurt, pretty sore; in other words, it was more or less of a shock when I said that.

Q. You had never worked this ship before, that is, No. 1 hatch, is that right? A. No.

Q. What? A. That is right.

(Testimony of Roy E. Potter.)

Q. Have you ever seen a railing that pulled out with you during the time you worked that was moused or shackled?

A. I never paid any attention to No. 1 hatch when I didn't work it.

Q. So when you talk about the custom of securing the gear on a ship, you are referring not to this particular piece of equipment but just a general custom, isn't that right?

A. Any movable gear on a ship that is not in use is supposed to be secured.

Q. I understand what you say, but you are not referring to this particular equipment because you don't know?

A. Just any gear. In my case I am referring to it, yes.

Q. As a matter of fact, there isn't any custom? You don't know whether there is a custom with respect to this piece of [48] equipment?

Mr. Pozzi: On that ship?

Mr. Brooke: On that ship.

A. Supposed to be secured if not in use.

Q. You are talking generally. I am talking about this piece of equipment, Mr. Potter. You don't know whether that is supposed to be done as to this particular piece of equipment?

A. Yes, it is supposed to be. It is movable.

Q. I understand that, but, I say, with respect to this piece of equipment, you don't know of any custom with respect to this particular railing, not

(Testimony of Roy E. Potter.)

other ships you have worked on but this particular railing?

A. Any of them that had that railing is supposed to be secured. I still maintain that fact.

Q. I think you testified you saw Dr. Harris when you went back to the hospital? A. Yes.

Q. On Tuesday?

A. I saw Dr. Harris on Monday.

Q. You saw Dr. Harris on Monday and you went to the hospital Tuesday? A. Yes.

Q. That is when you were in traction?

A. Yes. [49]

Q. You were in traction three days?

A. I was in there Tuesday, Wednesday, Thursday and Friday, until Friday afternoon.

Mr. Brooke: I thought the hospital records showed only three days.

Mr. Pozzi: No, four.

Mr. Brooke: That is all.

Mr. Pozzi: No further questions. Just a moment, your Honor.

Redirect Examination

By Mr. Pozzi:

Q. You mentioned something about your head getting a rap. Would you tell the Court whether or not some time after the accident you noticed you had a bump on your head?

A. I did have a slight bump.

Q. Where was the bump?

(Testimony of Roy E. Potter.)

A. Right in back here (indicating), where I hit on the deck.

Q. Mr. Brooke has asked you about other ways in which you could have gone, and you said one was where you could have climbed up over this railing. You went a third way. Would you state whether or not that third way appeared safe to you?

A. It looked safe to me.

Mr. Brooke: I object to that as a conclusion of the witness. [50]

The Court: Overruled.

Q. (By Mr. Pozzi): Would you state whether or not that was the shortest distance between you and Mr. Girt, the route you took?

A. Yes, it was, from where I was standing.

Mr. Pozzi: That is all.

Mr. Brooke: No further questions.

(Witness excused.) [51]

E. L. CLARK

produced as a witness on behalf of Libelant, and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pozzi:

Q. Where do you live, Mr. Clark?

A. 2715 Broadway, North Bend, Oregon.

Q. How old a man are you? A. 37.

Q. You are a longshoreman by occupation?

A. Yes.

(Testimony of E. L. Clark.)

Q. How many years have you been a longshoreman? A. About 12 years, counting the war.

Q. Counting what? A. War service.

Q. You worked as a longshoreman during the war. That was a Navy unit, is that correct?

A. Yes.

Q. Speak up, Mr. Clark, so the Judge can hear your answers. You are a winch driver, is that right?

A. Yes.

Q. You were the steady winch driver in the same gang Potter worked with? A. Yes.

Q. On the day of the accident you were with the gang on the [52] job? A. Yes.

Q. Do you recall the accident? A. Yes.

Q. The accident happened about 8:30, is that your recollection, in the morning? A. Yes.

Q. Were you on or off the winches for that hour, the first hour? A. I was hatch tender.

Q. That means your partner was driving?

A. Yes.

Q. At the time the accident happened, where were you standing, or where were you?

A. I was on the forepeak.

Q. I am going to hand you Respondents' Exhibit No. 6-D, which is a blown-up photograph and which shows—I guess that is the walking boss. Could you hold that up and show the Judge where you were standing when the accident happened? Could you put your finger on it?

A. Right here, about four feet from him.

Q. Four feet from Potter?

(Testimony of E. L. Clark.)

A. From the libelant.

Q. Would you state whether or not you saw Mr. Potter fall?

A. Yes. I was watching him come across [53] there.

Q. Do you know why he was coming across?

A. To see Marvin, to ask Marvin something about the marking off—I don't think he understood it or else he was coming over to get a clarification.

Q. Tell the Judge in your own words what you saw when Mr. Potter fell; tell the Judge what you observed about how it happened.

A. Well, he was coming across there and it looked to me like he was sliding one foot behind the other one and hanging onto that railing. When he got almost to the ladder that hook came out and he went right over backwards.

Q. Did you see him land, when he hit the deck?

A. I am not quite sure. I went down the ladder as fast as I could.

Q. When he fell backwards, did you see his body fall down to the deck? A. Yes.

Q. Would you state whether or not there was any gear down there that he landed on?

A. There was some peaveys laying there.

Q. Did you see in what position his body contacted the deck? Was it the way described by the libelant, that he landed on his head and neck and the upper part, as he fell backwards? Is that about right? A. Yes. [54]

Q. The way you saw it? A. Yes.

(Testimony of E. L. Clark.)

Q. You say you went down the ladder. What did you do when you got down the ladder?

A. Helped him up.

Q. When you first got to him, how did he appear to you to be?

A. I figured he was hurt pretty bad. He was kind of in a daze or something.

Q. What did you do with him when you got him up on his feet?

A. I helped him up that ladder.

Q. You are the man who helped him up the ladder, is that right? A. Yes.

Q. After you helped him up the ladder, then what happened?

A. We all told him he had better go to the hospital and get X-rayed.

Q. Did you stay on the job? A. Yes.

Q. Do you know Mr. Fertig? A. Yes.

Q. Was he the gang steward? A. Yes.

Q. Do you know whether or not Mr. Fertig made an inspection of the railing? [55]

A. After he had picked on there with his hook, there was a hole.

Q. Pardon?

A. There was a hole in the hook, after he dug out part of the paint.

Q. Will you state whether or not that hole was painted over before Mr. Fertig started digging it out? A. That is what he dug out.

Q. He dug out part of the paint? A. Yes.

Q. Was there any pin in there? A. No.

(Testimony of E. L. Clark.)

Q. Was there any cotter key in there?

A. No.

Q. Was there any shackle or anything—in the eye of the hook, I am referring to? A. No.

Q. Was there any mousing—you know what I mean by “mousing”? A. Yes.

Q. Was there any mousing around the end of the hook or near the end of the hook? A. No.

Q. It is stipulated that the rail was three-quarters of an inch in diameter. I am handing you Respondents' Exhibit 6-D. If a mousing were properly put on there in order to prevent [56] the hook from pulling off, would the mousing show from up above?

A. It probably would not. It might be underneath that eye.

Q. If the mousing were put down on the point of the hook, would that hold it, down on the end of it? A. If it were put on there properly.

Q. If it were put through the hole, it would, is that right? But if it was just wrapped around one end of the hook, would that keep the hook from falling out?

A. If it was put on there properly, it probably would.

Q. If it was put on tightly? A. Yes.

Q. Your gang went to work at 8:00 o'clock that morning. Had that railing been in the same position all the time you worked before he was hurt?

A. As far as I know, yes.

Q. You were up on the forepeak tending hatch, is that correct? A. Yes.

(Testimony of E. L. Clark.)

Q. The railing would be right in front of you all the time? A. Yes.

Q. Had any longshoremen done any work with that railing in any way before this man was hurt?

A. No.

Mr. Pozzi: You may inquire. [57]

Cross-Examination

By Mr. Brooke:

Q. I understand Mr. Potter had a cargo hook in his pocket that was bent? A. Yes.

Q. Did he have that in his pocket?

A. Yes.

Q. Which pocket?

A. I believe it would be the right one.

Q. His back pocket? A. Yes.

Q. Back here? A. Yes.

Q. As I understand your testimony, when Mr. Fertig took his cargo hook and dug out the paint on one part of this hook, he found the eye?

A. Yes.

Q. Is that right? A. Yes.

(Witness excused.) [58]

MARY POTTER

produced as a witness on behalf of Libellant, and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pozzi:

Q. You are the wife, of course, of Roy E. Potter? A. Yes.

Q. You have two children?

A. I have five altogether.

Q. But you and Roy have two children, ages seven and four? A. That is right.

Q. Children of your own? A. Yes.

Q. Do you recall the day Roy was hurt?

A. Yes.

Q. What time did he get home that day?

A. About 1:00 o'clock.

Q. What was his condition when you saw him at 1:00 o'clock? What did you observe?

A. His condition was very bad. He couldn't hardly stand up. They had to help him in the house.

Q. How did you get him in bed?

A. Well, I undressed him and put him to bed.

Q. Did he make any complaints to you of any pain at that time? [59]

A. Yes, he complained his head hurt; he had a great big lump on the back of his head and his back and his shoulder hurt, he said.

Q. Before the accident, Mrs. Potter, what condition of health did your husband enjoy before the accident? A. Very good.

(Testimony of Mary Potter.)

Q. Was he a steady worker? A. Yes.

Q. Before the accident had he ever complained about back pain or neck pain or headaches?

A. No, he didn't.

Q. Mrs. Potter, after Roy got out of the hospital, where he was taking these treatments and started working in March of this year, taking jobs on the dock, when he would come home from work at night, what kind of shape was he in?

A. Not very good. Lots of nights he would come home to eat his supper—sometimes he wouldn't even eat hardly anything but he would go to bed.

Q. How about sleeping at night?

A. He didn't sleep very good. Lots of nights I would have to get up and rub his back and get the heating pad and put on it.

Mr. Pozzi: You may inquire. [60]

Cross-Examination

By Mr. Brooke:

Q. After this accident, when you rubbed his back and got the heating pad, did you find the muscles of his back were tight, that there was any tenseness in his back? A. Well, no.

Mr. Pozzi: I don't believe she can answer that. She is not a medical witness.

Q. (By Mr. Brooke): You say, "Well, no." What do you mean?

A. Well, I don't know just how to answer. Lots of times it would help things some when I would rub it and put the heating pad on.

(Testimony of Mary Potter.)

Q. What I was wondering about was whether the muscles were tight, as if pulling. Did you notice that when you rubbed his back? A. No.

Q. You noticed that at no time?

A. No, I have not.

Mr. Brooke: That is all.

Mr. Pozzi: That is all.

(Witness excused.)

Mr. Pozzi: Libelant rests subject to the production of the Keizer Hospital records.

Mr. Brooke: The respondent is ready to proceed, your [61] Honor.

Respondents' Testimony

WILLIAM J. HAROLD, JR.

produced as a witness on behalf of the Respondents, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Brooke:

Q. I have handed you the various exhibits that have been admitted in evidence in this case; during the course of your testimony, if you would like to refer to them, you may.

What is your name?

A. William J. Harold, Jr.

Q. Your address? A. Oswego, Oregon.

(Testimony of William J. Harold, Jr.)

Q. What is your occupation?

A. Supercargo.

Q. What is the nature of your work?

A. The control of the loading of cargo aboard a vessel.

Q. How long have you been engaged in that?

A. Ten years as supercargo.

Q. Had you worked ships prior to that time?

A. Yes, I started on the waterfront in 1933.

Q. In what capacity? [62] A. Sailor.

Q. Are you familiar with the vessel S.S. Romulus that Mr. Potter was injured on? A. Yes.

Q. Have you ever worked that ship as supercargo?

A. Yes, I have worked it numerous times.

Q. Approximately how many times?

A. I would say 17 or 18 times.

Q. Were you on the vessel the day Mr. Potter was injured? A. Yes.

Q. The vessel was in North Bend at the time?

A. North Bend, at the City dock.

Q. Where were you immediately prior to the accident?

A. I was in the supercargo's office amidships.

Q. Did you hear about the accident shortly after that? A. Yes.

Q. What did you do?

A. I walked out there to see what I could see. I went no further than the bridge.

Q. Tell the Court what was the general nature

(Testimony of William J. Harold, Jr.)

of the cargo at the site of the accident, how it was stowed, and so forth.

A. Both wings forward as well as on deck, approximately six-foot capacity—six foot six inches—the cargo was stowed to a height of six foot with the exception of three feet from the hatch coaming, and cargo at that time was stowed three [63] feet from the deck——

Q. You are referring now to the forepeak load, I understand. On the inshore side of that forepeak load there was a projection coming out from the main deck three feet high, approximately three feet high, and about three feet wide?

A. On the offshore, not inshore.

Q. However, from the top of the deckload to this shelf or projection was about three feet or three and a half feet? A. Yes.

Q. With the deckload approximately abutting up against the after end of the forepeak on the port side?

A. Very close to it, yes, just a matter of inches.

Q. Did you learn how this accident happened to Mr. Potter?

A. Yes; not through Mr. Potter, no.

Q. In any event, you learned how it happened, did you not? A. Yes, sir; I did.

Q. Did you learn that while he was sidestepping along the outside edge of the forepeak, that when he arrived to the section of the railing immediately adjacent to the ladder, that big section came out?

A. Yes.

(Testimony of William J. Harold, Jr.)

Mr. Pozzi: Object to that as hearsay.

Mr. Brooke: Is there any question about that?

Mr. Pozzi: You and I entered into a stipulation and it is part of the agreed facts. [64]

Mr. Brooke: I am trying to find out if he learned that is how the accident happened.

Mr. Pozzi: He said he didn't learn it from Potter.

Q. (By Mr. Brooke): You are familiar with the section of the railing on the after edge of the forepeak immediately adjacent to the amidships ladder, are you not? A. Yes.

Q. Will you describe, in general, that section for the Court? A. It is a set of rails——

Q. Maybe the sketch which has been drawn will serve the purpose. I refer to Respondents' Exhibit No. 9. Does that illustrate the situation?

A. Yes, it illustrates it to me.

Q. I am referring to the railing which is immediately to the left of the ladder shown in the sketch. Does that give a fair representation of the way the forepeak railing is?

A. To the best of my recollection, yes.

Q. Is that also true with respect to Respondents' Exhibit No. 6-D? A. That is true.

Q. In Respondents' Exhibit No. 6-D it appears as if that railing can be removed or that it is a movable railing. As to the section immediately adjacent to the ladder, do you know that to be a fact, that it is a movable section? [65]

A. Yes, it is.

(Testimony of William J. Harold, Jr.)

Q. What is the reason for that?

A. It is to bring the mooring lines down to the deck.

Q. What is that?

A. To bring the mooring lines down.

Q. I do not understand the reason for the removal of the section. I ask you this: Isn't it true sometimes the lines run from up forward down to No. 1 hatch, to the winches for No. 1 hatch?

A. That is right.

Q. That was the reason why this particular section had been a removable section?

A. That is the way it was constructed; that is why it was constructed that way.

Q. Is there any other section of the railing of that forepeak that also is a removable section, movable? By that, I mean on the other side of the ladder? A. To the best of my knowledge, no.

Q. You do not think there is one on each side of the ladder? A. No.

Q. Is there one maybe two sections away from the ladder? A. No.

Q. I don't know whether the picture will show that or not. I think, as a matter of fact, it does.

A. I never noticed it removed. [66]

Q. After examining these pictures, have you refreshed your memory on that point?

A. I can't remember ever having seen this removed.

Q. During the time you worked this ship—as I understand, 17 or 18 times—had you ever seen any-

(Testimony of William J. Harold, Jr.)

one walking along the after edge of this railing as Mr. Potter did when he was injured?

Mr. Pozzi: Objection, your Honor.

The Court: Overruled.

Q. (By Mr. Brooke): Had you ever seen anyone do that before?

A. Not to my recollection, no.

Q. After this accident, did you go up on the forepeak and examine the hook and eye, the eye in which the hook was inserted in this railing? Some time afterward did you do that?

A. Some time after the accident I went on the forepeak and took a look at the rails involved and looked at it.

Q. What is that? A. And just looked.

Q. Tell the Court how the hook and eye fit.

A. Well, the hook was about, I would say, three inches long, maybe better, and it fit into an eye and the point of the hook came down at least an inch and probably better, an inch or an inch and a half, I would say.

Q. How did the hook fit in the eye with respect to being loose or otherwise? [67]

A. When I saw these rails, the top part of the hook had reached the sides of the hole and was fitting into the hole.

Q. Did it appear to be a tight fit?

A. Then I would say it appeared to be tight.

Q. From the place where Mr. Potter was standing, that is, on the forward part, on top of the deckload, what was a route he could have taken to

(Testimony of William J. Harold, Jr.)

get up on the forepeak, just in front of the emergency ladder on the forepeak?

A. Well, he could have stepped down onto the wharfway and walked up the ladder.

Q. Walked across the main deck and up the ladder? A. Yes.

Q. What was another route he could have taken?

A. Well, he could have walked from where he stepped over the rail directly ahead.

Q. Did you ever see any men fall in going that way while you have worked these ships?

A. I can't say that I have, no. I have seen men step down from deckloads.

Q. That is very common?

A. And I have seen men step over the rail, but on this particular ship I can't say yes or no.

Q. These procedures you have seen are common in working deckloads, are they not?

A. I would say yes. [68]

Mr. Brooke: That is all.

Cross-Examination

By Mr. Pozzi:

Q. You had not looked at the removable portion of that railing prior to the accident?

A. No, sir.

Q. Incidentally, you worked directly for the ship at the time of the accident?

A. I was working for the ship's broker.

Q. The ship's agent? A. Yes.

(Testimony of William J. Harold, Jr.)

Q. You were not an employee of the stevedoring company? A. No, sir.

Q. In response to a somewhat leading question by Mr. Brooke, you said when you got there you looked at the hook and it appeared to be a tight fit. I assume what you meant was that any time something fits like that, if it is bigger on top, from looking down on it it would appear to be tight?

A. Yes, I imagine the top side hooked on it.

Q. You don't know whether it was like that at the time of the accident, do you? A. No.

Q. Had you tested it to see that it fit?

A. No. [69]

Q. These pictures demonstrate there is quite a sharp taper to that hook end. Did you notice that?

A. Yes.

Q. Isn't it true if there is a sharp taper like that that lots of times the rail will turn? In other words, there doesn't have to be much motion in it before it will turn?

A. It would have to be, but I never tried it.

Q. I understand you used to be a sailor?

A. Yes.

Q. Haven't you ever seen that happen?

A. I have never seen that on a ship I sailed.

Q. You have not?

A. American ships ordinarily have solid rails with removable sections.

Q. You mean a solid top where you lift the stanchions right out, when you take the whole rail section down?

(Testimony of William J. Harold, Jr.)

A. Yes, when you take the whole rail section down.

Q. You heard the testimony about an eye in the end of the hook. What was the purpose of that eye in the end of the hook?

Mr. Brooke: I object to that, your Honor.

Mr. Pozzi: You asked him a lot of other questions about that.

The Court: He may answer.

A. I don't understand what you mean by "in the end of the hook." [70]

Q. (By Mr. Pozzi): In the end of this hook, near the end—I think Mr. Brooke asked you about that. There is testimony there is a little hole through the hook end. In other words, here is a hook and there is a hole through there. What is the purpose of that hole?

A. The purpose of it is to put a cotter key in there to keep the rails secure.

Q. You used to sail on ships and you have worked on them a lot as a checker and supercargo. When railings are not being used, then they are secured in some manner? A. Yes.

Q. When they are left there? A. Yes.

Q. In this particular case you assume that hole was to put a cotter key or shackle in?

A. I would assume that.

Q. The purpose would be to prevent it from pulling out, would it not, or holding it down?

A. Yes.

Q. Referring to Respondents' Exhibit 6-H, un-

(Testimony of William J. Harold, Jr.)

derneath that railing there is what appears to be—
what do you call that device? Is that a chock?

A. That is a chock.

Q. What is the purpose of that?

A. It is to take the strain of the rope leading to
that winch, [71] the winches on No. 1.

Q. You will note a line here, a rope going down
to the deck and out to the spring lines. Is that cor-
rect?

A. Yes.

Q. Isn't that what that chock is for?

A. The chock is also leading off these winches.

Q. It was also used for that? A. Yes.

Q. But it is used for these lines, too?

A. Yes, it could be used for those off over here
(indicating).

Q. You have testified the reason for removing the
railing is to stretch the lines through to the winch?

A. That is the reason that section is made re-
movable.

Q. Isn't that chock directly under the rail?

A. Yes, but the chock won't hold a line that is
bound around.

Redirect Examination

By Mr. Brooke:

Q. Mr. Pozzi discussed with you the fact that
there is a little hole at the end of the hook, and you
felt it probably was there for the purpose of hold-
ing a key.

Mr. Pozzi: I object. He didn't say that he felt
anything. He said the purpose was for a cotter key.

(Testimony of William J. Harold, Jr.)

Q. (By Mr. Brooke): You can only assume that? A. I would assume that. [72]

Q. Assume the hole is completely painted over with several coats of paint, so that it no longer exists, you can no longer make that assumption? You cannot make that assumption?

A. No, I couldn't tell you.

Q. Assume that there was a hole there—and I assume there was—for the purpose of keeping the rail secure, if it was painted over—and it has been painted over for some time—you cannot make that assumption, can you? A. Right. I can't.

Q. Mr. Pozzi has asked you some questions about this hook, the general tenor of which was that the end of the hook had a severe taper. I think he referred, in asking the questions, to Libelant's Exhibit No. 1-B. That picture does not reflect any severe taper, does it? A. No.

Mr. Brooke: That is all.

(Witness excused.) [73]

MARVIN GIRT

produced as a witness on behalf of Respondents, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Brooke:

Q. Your name is Marvin Girt and you live in Coos Bay or Empire? A. Empire.

(Testimony of Marvin Girt.)

Q. Down by Coos Bay? A. Yes.

Q. You work as walking boss for the Independent Stevedoring Company, is that correct?

A. Yes, sir; I do.

Q. How long have you been a longshoreman?

A. I started in 1935; from then on, except when I quit during the war.

Q. When did you become a walking boss?

A. In January, 1949.

Q. Were you walking boss for the Independent Stevedoring Company on the day Mr. Potter was injured? A. Yes, I was.

Q. Where were you standing at the time of the injury?

A. I was standing amidships on the forepeak forward, just ahead of the ladder.

Q. From where you were standing to the deck-load, where [74] Mr. Potter was standing immediately before his injury, you were about 10 feet away, is that right? A. Right.

Q. Had you worked on the S.S. Romulus before? A. Yes.

Q. Approximately how many times have you worked that ship?

A. Three years as a longshoreman and walking boss combined, approximately 14 or 15 times.

Q. As Mr. Potter was walking along, he came to the section immediately to the port side of the ladder amidships, when the railing came out, is that right? A. Yes, sir.

(Testimony of Marvin Girt.)

Q. Describe how the accident happened, in your own words.

A. He stepped from the deckload to, I will call it the forecastle, which is the forepeak, and hand over hand along the railing. When he got approximately in the middle of the railing, or closer to the ladder, the railing came out of the socket end he went over backwards.

Q. Did he hold onto the railing after it came out of the socket? A. Momentarily is all.

Q. Then he let go of it?

A. He let go of it, yes.

Q. How did he fall?

A. Backwards, and lit on his hip. [75]

Q. Then what did he do?

A. Tipped back and hit his head.

Q. Was he knocked out? A. No, sir.

Q. What did he do after that?

A. Well, he laid there a while and I started down the ladder to where he was, because I figured the man was hurt worse than what it looked like right then. He laid there for a few seconds before he got up. Of course, the first thing you ask a man is, "Are you hurt?" And Roy said, "I don't think so," which could mean anything at the time.

Q. Did he get up then? Did he go up the ladder?

A. He got up—I can't remember helping him up there, but we ended up talking about it up on the forecastle.

Q. Where you had been standing before the accident? A. Yes.

(Testimony of Marvin Girt.)

Q. Do you have the large pictures there before you? A. Yes.

Q. I think it shows in the large pictures that there is a hand railing along each side of the ladder so that when you climb up the ladder you have something to hold onto? A. Yes.

Q. Was that the situation at the time of the accident?

Mr. Pozzi: That is stipulated.

Mr. Brooke: All right. [76]

Q. How long did Mr. Potter remain up there on the forepeak with you before he left the ship?

A. Well, I was there—I had the whole ship to watch. I would say he stayed there approximately 15 or 20 minutes. From there I don't know where he went because I went back and made out a report right then on it, the usual report that we make.

Q. Did you see him later? A. Yes.

Q. After you had finished your report?

A. Yes.

Q. Where was he?

A. Well, he was still aboard ship. That is when he left and went up to the hall to get his report made.

Q. About how long after the accident did he leave to go up to the hall?

A. Oh, I would say approximately an hour.

Q. After he left, of course, you kept on working the ship. Did he return to the ship later on that day? A. Yes, he did.

Q. When was that?

(Testimony of Marvin Girt.)

A. Around 11:00 o'clock I remember he was down there.

Q. Did he tell you at that time he could not work the shift?

A. He told me he was going to be back up for a check-up or something at the hospital, which I said was a very good idea, [77] to go in and find out what was the matter.

Q. Then he left again, is that right?

A. Yes.

Q. Did you see him any more the rest of that day?

A. No. The gang finished the ship that day.

Q. This railing that pulled out—did you see that happen? A. I seen it happen.

Q. You were looking at Mr. Potter when it happened?

A. That is right. I was very close to him when it happened.

Q. How did the railing come out, in what direction? A. Straight out.

Q. Then it fell to the side when he lit?

A. It fell back, yes. Most of his body went the same way; he fell back.

Q. Do you know whether or not Mr. Potter landed on top of any gear down there, or how did he land?

A. There was gear on the deck, but I am pretty sure he lit flush on the deck.

Q. This section that pulled out when Mr. Potter was walking along the after edge of the forepeak,

(Testimony of Marvin Girt.)

or forecastle, do you know why that is a removable section?

A. Well, it was built that way for the mooring lines, in case of an emergency, to use the No. 1 winches. It was built that way by the original builders.

Mr. Pozzi: I move to strike that answer as hearsay. [78]

The Court: Overruled.

Q. (By Mr. Brooke): Did you know prior to this accident that this was a removable section?

A. Well, yes.

Q. This section of railing, as I understand it, goes along and then there is a bend in the railing and what we call a hook which is inserted over an eye which is in the top of the stanchion, and that holds the railing in place. Is that generally correct?

A. Right.

Q. Did you see Mr. Fertig pick out the paint, so that this little eye was found in the end of the hook?

A. No, I wasn't present.

Q. Did you see that little hole or eye in the end of the hook after Mr. Fertig inspected it?

A. Afterwards, yes.

Q. Could you tell the Court in your best judgment how many coats of paint had been painted over that eye?

A. Numerous coats; maybe eight or nine coats, or ten.

Q. During the time you have worked this ship, state whether or not you have ever seen any other

(Testimony of Marvin Girt.)

longshoremen walk along the after edge of the fore-castle.

Mr. Pozzi: Objected to as irrelevant.

The Court: Overruled.

A. I can't remember whether—I can't say yes or no. [79]

Q. To the best of your recollection, have you ever seen anybody do that before?

Mr. Pozzi: Objection, your Honor.

The Court: Overruled. Answer the question. Hurry on.

A. No.

Q. (By Mr. Brooke): After the accident was the railing put back in place? A. Yes.

Q. To your knowledge, was there any mousing or cotter pin or other instrument put on there to hold it in place? A. Not immediately.

Q. When you say that, you mean immediately afterwards, and you didn't see anything done to it?

A. That is right.

Q. During the time you had worked this ship before, had you ever seen anything done to secure that railing in place while the ship was being worked? A. No, I never observed it.

Q. After the accident, did you go up on the fore-peak and make a check as to what force it would take to pull that railing out of the eye? Did you or did you not? A. Yes.

Q. Will you explain to the Court what you found?

(Testimony of Marvin Girt.)

A. Well, I found that it had to be pulled straight out.

Q. Before the railing would come out? [80]

A. Yes.

Q. What was the effect of a lateral force against the railing? A. Well, it would stay.

Q. The railing would stay in place with a lateral force exerted? A. Yes.

Q. State whether or not at different times you have seen men in the position Mr. Potter was going from that position onto the forepeak? Have you ever seen that done while working that ship or similar ships, any similar situations on other ships?

A. Yes.

Q. Which route did you see them follow?

A. I have seen them go all ways.

Q. Would one of the ways be from the top of the deckload down to this wharf or ledge?

A. Yes.

Q. Would another way have been up over the railing onto the forepeak? A. Yes.

Q. That was a direct route to where you were, was it not? A. Yes.

Q. Is it not true that Mr. Potter, after sidestepping along the after edge of this railing, would have had to have climbed [81] over the hand rail and ladder before he got up to where you were or stepped up in front of you?

A. If he intended to come clear over onto the forecastle.

(Testimony of Marvin Girt.)

Q. He testified he did. A. He did?

Mr. Pozzi: No, he did not.

Mr. Brooke: I asked him that question.

Mr. Pozzi: He said he was coming over to this spot.

Mr. Brooke: This hook of the railing, the part that is inserted through the eye to hold it in place, state whether or not there was any taper, to your knowledge, in the hook, towards the end of the hook, or was it the same diameter all the way through?

A. To my knowledge, it was approximately three-quarters of an inch the full length of the hook which was three inches long.

Q. Approximately three inches long?

A. Yes.

Q. I think I asked Mr. Harold this: Do you recall whether or not there was also a removable section of this guard railing on the other side of the midships ladder?

A. I am very certain there was. It was further from the midships ladder, though.

Q. I think it was one section over. The hook on this railing that pulled out, that was inserted into the eye, when you [82] examined that, did it appear to be a snug fit? A. Yes.

Mr. Brooke: That is all the questions I have.

(Testimony of Marvin Girt.)

Cross-Examination

By Mr. Pozzi:

Q. Had you ever observed, prior to the time of the accident, this particular rail being out of the eye? A. No.

Q. This was the only occasion you ever had to see that rail out, at the time of this accident?

A. Yes.

Q. When railings are in place on a ship and not in use, they are always secured, aren't they, so that they won't come out?

A. Various devices are used.

Q. There are different devices used?

A. That is right.

Q. You see some with shackles, some shackled, or see them moused off or tied off with twine. You have seen that? A. Yes.

Q. And you have seen them with cotter keys, a kind of a heavy cotter key device used. Have you seen them? A. Yes.

Q. Had you looked at that hook-and-eye device on the railing before the accident happened? Had you inspected it? [83] A. No.

Q. At the time the accident happened where were you looking at the moment the hook pulled loose from the eye? A. I was looking aft.

Q. At whom were you looking or at what were you looking?

A. Well, we were talking and I remember I told

(Testimony of Marvin Girt.)

Roy—he was the acting gang boss that day—something about the lumber, and he had started over to talk to me.

Q. He was somewhat at a diagonal from you, and you said something to him, is that right?

A. That is right.

Q. And when you said that, then he started over to you? A. That is right.

Q. Is that right? A. Yes.

Q. At the moment he fell, you say you were looking aft. At what were you looking?

A. I don't know, but I was just looking. He was in my vision and I seen it happen.

Q. You saw the upper part of his body, his face?

A. I saw all his body through the railing.

Q. What I am getting at is this: Were you looking at the eye in the hook at the moment the accident happened? Were you looking at that?

A. No. [84]

Q. Isn't it true you were looking at Mr. Potter himself?

A. Well, I remember he was in my vision. I don't know whether I was looking at him personally or not.

Q. You recall his being there and you saw him start to go over backwards? A. That is right.

Q. You say Mr. Potter was not knocked out. When you say that, isn't it true that what you are saying is that, as you observed him, you did not think he was unconscious? A. That is right.

Q. That is what you mean?

(Testimony of Marvin Girt.)

A. That is what I was looking for, to see if he was.

Q. You realize sometimes people can talk and walk about and do everything else and still be out, or do you realize that?

A. I didn't realize it then, no.

Q. You say that little eye in the hook had eight or nine coats of paint in it. How did you determine it had been painted over?

A. By examining it after the accident happened.

Q. Did you examine each coat of paint and count them all? A. No, I said approximately.

Q. Isn't it true it just appeared to have been painted at least more than a couple of times?

A. Yes, sir.

Q. This, of course, was ship's paint? It is heavy paint, [85] isn't it? A. It is heavy enamel.

Q. You do not know whether, at the moment the accident happened, the hook end was down tight into the eye or not, do you, because you had not looked at it before the accident; you had not inspected it?

A. The only way I have to tell is by the way the paint broke loose, when we examined it after the accident happened.

Q. You don't know whether or not the paint was broken loose then or at some other time?

A. Or before, no.

Mr. Pozzi: That is all.

(Testimony of Marvin Girt.)

Redirect Examination

By Mr. Brooke:

Q. I think this is irrelevant, perhaps, but for the record, could you tell the Court from your experience what would be the purpose of this guard railing?

A. It was for the purpose of protecting the men from falling off the forecastle when they were working there—I should say, sailors working there at sea; also when a man was walking along the forecastle, a longshoreman or sailor, to keep him from falling off the forecastle onto the main deck, in case they would fall sideways.

Q. I think I am right when I say you testified the railing [86] would serve that purpose?

A. Yes.

Mr. Brooke: No other questions.

Recross-Examination

By Mr. Pozzi:

Q. You worked a good many years as a longshoreman. You have walked rails, haven't you, walked the edges? A. Yes.

Q. You have to do it a lot of times in your work?

A. Yes.

Q. And you always expect them to be secure, don't you? A. Yes.

Mr. Pozzi: That is all.

(Testimony of Marvin Girt.)

Redirect Examination

By Mr. Brooke:

Q. When you say you walk the edges, what do you mean by that?

A. Out on the edge lots of times. A longshoreman, lots of times, if a chain or something is fouled, he will walk along the edge of the ship, along the railing.

Q. Trusting the rail will hold him from falling over? A. Yes.

Q. This rail would serve that purpose, would it not? [87] A. Yes.

Mr. Brooke: That is all.

(Witness excused.)

Mr. Brooke: The respondents rest. We are not going to call our doctor.

Mr. Pozzi: I don't think we need to put on any rebuttal. The libelant rests with the exception of the production of the hospital records. [88]

June 15, 1954

(Court reconvened at 10:00 o'clock a.m., pursuant to adjournment.)

MRS. BETTY GREENWALD

produced as a witness on behalf of Libelant, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pozzi:

Q. Mrs. Greenwald, you are the custodian of the hospital records at the Keizer Memorial Hospital in North Bend, Oregon? A. Yes, I am.

Q. Your position, I believe, is that of Assistant Superintendent of the hospital? A. Yes.

Q. Pursuant to a subpoena, did you bring with you the hospital records pertaining to the libelant in this case, Roy E. Potter? A. Yes, sir; I did.

Q. They have been identified, I believe, as Libelant's Exhibits 3-A and 3-B. Were those records kept in the regular course of business at the hospital?

A. Yes.

Q. Do they cover the period set forth in the subpoena, from September 28th until the 1st day of October, 1953? A. Yes. [89]

Mr. Pozzi: We will offer Libelant's Exhibits 3-A and 3-B for Identification in evidence.

Mr. Brooke: I have not seen the records as yet, but I will object to anything in these records which contains conclusions by doctors or diagnoses, as being conclusions or opinions of the doctors, con-

(Testimony of Mrs. Betty Greenwald.)

cerning which I have had no opportunity to cross-examine or look into.

The Court: They may be received subject to the objection. Any cross-examination?

Mr. Brooke: No cross-examination.

(Witness excused.)

[Endorsed]: Filed September 17, 1954. [90]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
District of Oregon—ss.

I, F. L. Buck, Acting Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Libel in rem and in personam with foreign attachment; Claim of vessel; Stipulation to abide the decree and for costs; Notice of general appearance; Answer; Pre-trial order; Memorandum of court; Findings of fact and conclusions of law; Decree; Notice of appeal; Petition for appeal and order allowing appeal; Citation on appeal; Assignment of error; Designation of parts of apostles; Order to forward exhibits to Court of Appeals, and Transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7202, in which Wiel and Amundsen,

A/S, as claimant of the S.S. Romulus is the respondent and appellant, and Roy E. Potter is the libelant and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith a duplicate transcript of proceedings, June 8 and 15, 1954, filed in this office in this cause. Under separate cover there is being forwarded Libelant's Exhibits 1-A to H, inc.; 1-J, -2, 3-A and 3-B; and Respondent's Exhibits 4, 5, 6-A to -I, inc.; 7-B, 8 and 9.

I further certify that the cost of filing the notice of appeal is \$5.00 and that the same has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District this 23rd day of September, 1954.

[Seal] /s/ F. L. BUCK,
Acting Clerk.

[Endorsed]: No. 14,527. United States Court of Appeals for the Ninth Circuit. Wiel and Amundsen, A/S, as Claimant of the S.S. Romulus, Appellant, vs. Roy E. Potter, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed September 25, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 14527

WIEL AND AMUNDSEN, A/S, Claimant of
the S.S. ROMULUS, Her Engines, etc., and
Respondents,

Appellant,

vs.

ROY E. POTTER, Libellant,

Appellee.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD

Appellant adopts as points on appeal the Assignments of Error included in the Apostles on Appeal on file herein.

Appellant designates for printing the entire Apostles on Appeal as designated by Appellant on file herein, except, pursuant to the stipulation on file herein, none of the exhibits, with the exception of Exhibits 1-B, 1-F, 6-D, 6-H and 9, need be printed. Appellant designates for printing Exhibits 1-B, 1-F, 6-D, 6-H and 9 only. The remaining exhibits may be considered by the Court in their original form.

Dated: October 6, 1954.

/s/ LOFTON L. TATUM,
Of Proctors for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed October 7, 1954.

[Title of Court of Appeals and Cause.]

STIPULATION AS TO EXHIBITS

It Is Hereby Stipulated and Agreed by and between Appellant and Appellee, acting by and through their respective proctors, that only Exhibits 1-B, 1-F, 6-D, 6-H and 9 need be printed and that all other exhibits admitted in evidence at the trial may be considered in their original form.

Dated: October 6, 1954.

/s/ LOFTON L. TATUM,

Of Proctors for Appellant.

/s/ FRANK H. POZZI,

Of Proctors for Appellee.

[Endorsed]: Filed October 7, 1954.

